TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1912.

No. [illegible]22.

[illegible]LOVER, BATES AND COMPANY, PLAINTIFF IN [illegible]

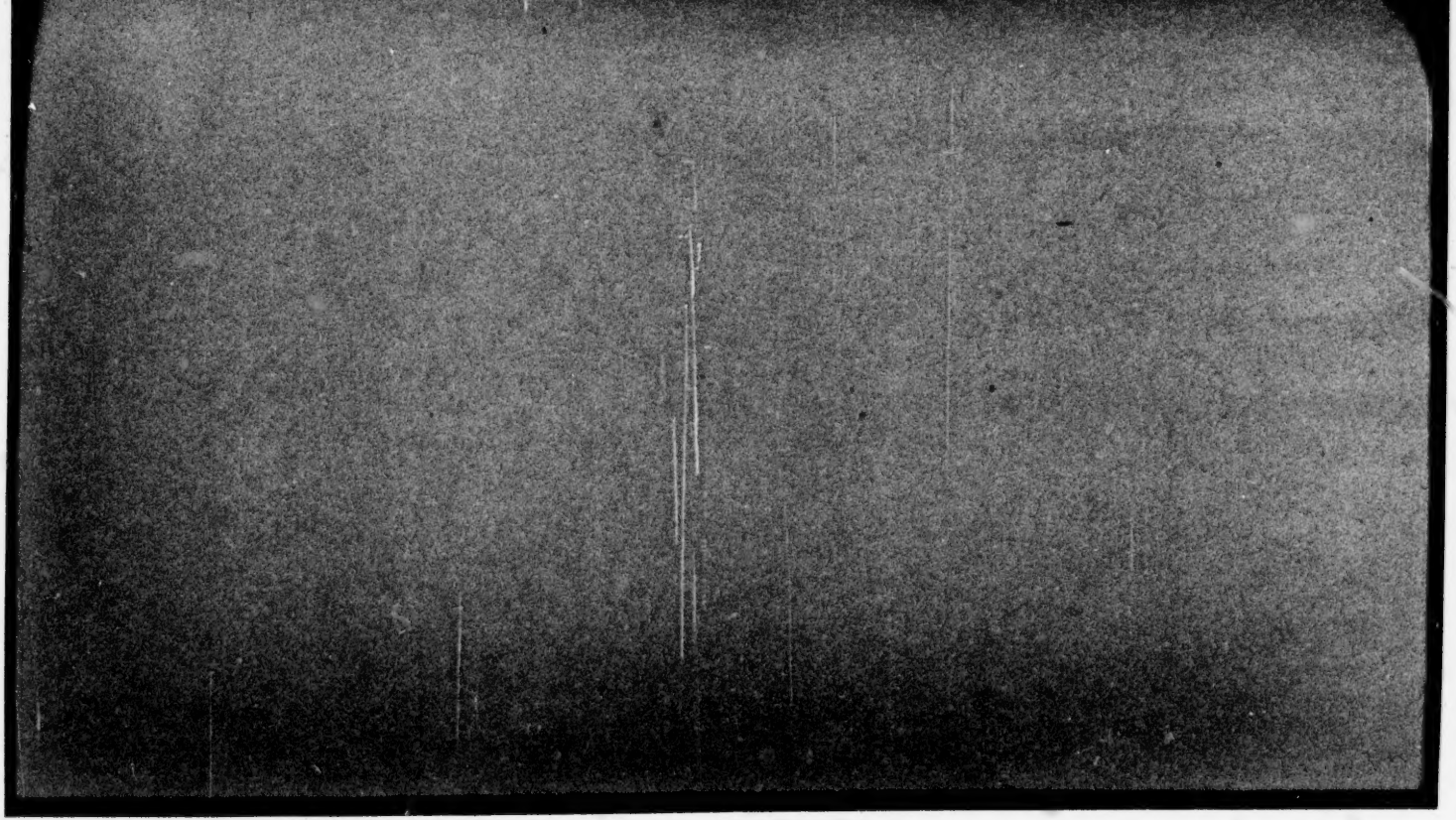
vs.

ELLA T. WALSH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED MARCH 29, 1912.

(22,078)



(22,078)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 238.

SELOVER, BATES AND COMPANY, PLAINTIFF IN ERROR,

vs.

ELLA T. WALSH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1912.

a State of Minnesota, Supreme Court.

STATE OF MINNESOTA,
Office of Clerk of Supreme Court, ss:

I, I. A. Caswell, Clerk of the Supreme Court of the State of Minnesota, do hereby, in obedience to the Writ of Error herein issued, certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said Supreme Court of the State of Minnesota, in the case between Ella T. Walsh, Respondent, and Selover, Bates & Company (a corporation), Appellant, including the opinion of the said Supreme Court therein, the Appellant's petition for rehearing and the order of said Court denying the same, as appears from the original files and records;

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are true and correct copies of the Petition for Writ of Error, with allowance of the same; of the Assignment of Error filed in the Supreme Court of the State of Minnesota; of the Assignment of Error and Petition for Reversal; of the Order granting supercedeas; and of the supercedeas undertaking, as the same remain on file and of record in said Supreme Court of the State of Minnesota, and also the original Writ of Error from the Supreme Court of the United States and the Citation issued thereon, with proof of service thereon and on each of the same endorsed, and that the foregoing constitutes a true, full and complete Return to said Writ of Error.

In witness whereof, I have hereunto set my hand and the seal of said Supreme Court, at the Capitol at St. Paul, Minnesota, this 24th day of January, A. D. 1910.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk of the Supreme Court of Minnesota.

b No. 16293. State of Minnesota, Supreme Court. Ella T. Walsh, Respondent, vs. Selover, Bates & Company, Appellant. Judgment Roll. Filed Jan. 8, 1910. I. A. Caswell, Clerk.

c STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the City of St. Paul, this 8th day of January, A. D. 1910.

[Seal of the Supreme Court of the State of Minnesota.]

I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed January 8, 1910. I. A. Caswell, Clerk.

d State of Minnesota, Supreme Court, October Term, A. D. 1909.

No. 103.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, a Corporation, Appellant.

Pursuant to an order of Court duly made and entered in this cause, on the 8th day of January A. D. 1910

It is here and hereby determined and adjudged that the order and decision of the Court below, herein appealed from, to wit, of the District Court of the Fourth Judicial District, sitting within and for the County of Hennepin be and the same hereby is in all things affirmed, and it is further determined and adjudged that the Respondent above named, do have and recover of said Selover, Bates & Company, a corporation, Appellant, herein the sum and amount of Four Thousand Three Hundred and Forty-Eight Dollars ($4348.00) according to the terms of the stipulation of the parties hereto, duly filed herein.

Dated and signed this 8th day of January A. D. 1910.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

e 16293. State of Minnesota, Supreme Court. Ella T. Walsh, Respondent, vs. Selover, Bates & Company, Appellant. Order for Judgment. Filed Jan. 8, 1910. I. A. Caswell, Clerk.

f State of Minnesota, Supreme Court.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, a Corporation, Appellant.

Order.

This cause having been duly argued and submitted at the general October term of this court A. D. 1909, upon the return on appeal herein and

The Court having heretofore after due and mature deliberation had thereon affirmed the order and decision of the Court below and,

The parties to this action having subsequently made and filed herein their stipulation that final judgment be entered in this court herein without remittitur,

Now therefore, it is here and hereby ordered that the said Respondent, Ella T. Walsh do have and recover from the said Appellant, Selover, Bates & Company, a corporation, the sum of Four Thousand Three Hundred Forty-Eight Dollars ($4348), and that final judgment be entered accordingly.

Entered January 8th, 1910.

By the Court.

Attest.

[Seal of Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the order for judgment in the cause therein entitled, as appears from the original, remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 8th day of January A. D. 1910.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

g 16293. State of Minnesota, Supreme Court. Copy Minutes of Argument. Filed Jan. 8, 1910. I. A. Caswell, Clerk.

h State of Minnesota, Supreme Court, General October Term, A. D. 1909.

FRIDAY MORNING, 9:30 *o'Clock, November 5th, A. D.* 1909.

Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 16293, Cal. No. 103.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, a Corporation, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

i 16293. State of Minnesota, in Supreme Court. October Term, 1909. Ella T. Walsh, Respondent, vs. Selover, Bates & Company, a corporation, Appellant. Return on Appeal. Arthur W. Selover, Attorney for Appellant, Minneapolis, Minn. A. B. Choate, Attorney for Respondent, Minneapolis, Minn. Filed Aug. 13, 1909. C. A. Pidgeon, Clerk.

State of Minnesota.

In Supreme Court.

OCTOBER TERM, 1909.

ELLA T. WALSH,

Respondent,

vs.

SELOVER, BATES & COMPANY, a Corporation, 2
Appellant.

Paper Book.

AMENDED COMPLAINT.

For amended complaint herein plaintiff alleges:

1. That defendant Selover, Bates & Company, during all the times hereinafter mentioned was, 3 and still is, a corporation duly created and existing and doing business in the State of Minnesota, and elsewhere, and under and by virtue of the laws thereof.

2. That on the 26th day of January, 1903, in consideration of the covenants and agreements therein set forth, and the payment by one P. D. Walsh to Silas H. Bates of the sum of two hundred and twenty-five ($225.00) Dollars, said P. D. Walsh and Silas H. Bates entered into a contract, a copy

of which is hereto attached, marked Exhibit "A," and hereby made a part of this complaint.

3. That at the time said contract, Exhibit "A," attached to the complaint herein, was entered into, said Silas H. Bates was an officer of the defendant corporation and made and entered into said contract for and on behalf of defendant corporation, and under and pursuant to an agreement so to do theretofore duly made and entered by and between said Bates and said defendant corporation. That in all acts, agreements and transactions done, entered into, or performed by said Bates in the execution of or in any way related to or concerning said contract, Exhibit "A," said Bates acted as the agent and trustee for and in behalf of said defendant corporation, and with its full knowledge, request and consent.

4. That subsequent to the making of said contract, and prior to the 1st day of January, 1906, said Silas H. Bates assigned, transferred and conveyed said contract, and all his interest therein; and all his estate, right, title and interest in and to the land therein described to said defendant Selover, Bates & Company, as such corporation, and in consideration therefor, said Selover, Bates & Company, as such corporation, assumed all the covenants and agreements in said contract mentioned to be kept and performed on the part of said Silas H. Bates, as the same was modified by oral agreement hereinafter stated.

5. That subsequent to the making of said contract and prior to the first day of January, 1907, said P. D. Walsh, for a valuable consideration, as-

signed, transferred and conveyed said contract as 7
modified as hereinafter stated, and all his interest therein, and all his estate, right, title and interest in and to the land therein described to this plaintiff, and plaintiff is now the owner and holder thereof, notice of which assignment was duly given to said defendant prior to the first day of March, 1907.

6. That said contract, Exhibit A, was executed at the office of the defendant in the city of Minneapolis, Minnesota, and on the same day and at said place said Silas H. Bates as agent and trustee for 8
said defendant, as aforesaid, and said P. D. Walsh entered into an oral agreement whereby the strict performance of the second covenant of the second party in said Exhibit A, which are in words and figures, as follows, to-wit: "Second, to pay, at the time when by the law the same becomes due and payable, to the proper collection officer, all taxes and assessments (special or general), which may be lawfully levied or assessed upon or against said lands, (including any such taxes or assessments levied for or during the year 1903 or subsequent 9
years)," was waived by said Bates for himself and for said corporation, and by the terms of said oral agreement said taxes were to be paid in the first instance by said Bates or by said defendant corporation, and said second party, or his assigns, were to be notified of the amount thereof, and thereupon said taxes were to be paid to said Bates, or to his assigns, the defendant corporation. That thereafter said P. D. Walsh and this plaintiff relied upon said waiver and did not, for that reason, pay said taxes

in the first instance to said collecting officer, and that said defendant paid the same, and accepted and received payment of said taxes from said P. D. Walsh.

7. That the defendant never required strict performance of said contract, Exhibit A, in any particular, but at all times and in regard to all of the covenants to be kept and performed by the second party therein named, said defendant waived strict performance of said contract, and in all its dealings with defendant said defendant and said Walsh and this plaintiff construed said contract as not required time to be the essence thereof.

8. That on the 2nd day of March, 1907, defendant paid thirteen and 96-100 dollars ($13.96) taxes which accrued upon the land described in said contract for the year 1906. That thereafter, and on the 5th day of March, 1907, without giving plaintiff any notice whatever of the amount of said taxes, and without giving plaintiff any opportunity to pay the same, defendant caused to be served upon said P. D. Walsh a notice in writing, a true copy of which is hereto attached, marked Exhibit "B," and hereby made a part of this complaint, whereby defendant attempted and pretended to exercise its option to terminate said contract for default in the payment of said taxes which accrued for the year 1906, and by the said notice attempted and pretended to annul, set aside and vacate said contract.

9. That, on the 8th day of April, 1907, this plaintiff, claiming that said contract was in full force and effect, and under and pursuant to and in

compliance with the terms thereof, as modified as aforesaid, tendered to said Selover, Bates & Company, as such corporation, the full sum of thirteen and 96-100 dollars ($13.96), which had been paid by said defendant as taxes for the year 1906 upon the lands described in said contract, as aforesaid, and an additional sum sufficient to pay any and all expense incurred by it in giving said notice, Exhibit "B," and offered to pay any penalties or expense paid or incurred by it in the payment of said taxes, which offer and tender were refused, on the grounds that said defendant had renounced said contract, and that said contract was vacated and at an end because of the failure of said P. D. Walsh to pay said taxes prior to the first day of March, 1907, and by virtue of the service of said notice (Exhibit "B") upon said P. D. Walsh, as aforesaid, and thereafter from time to time subsequent to said date, and up to the time of the commencement of this action, said defendant has repudiated and renounced said contract and asserted its intention not to be bound thereby or to comply with the terms thereof.

10. That at the time of the making said tender as aforesaid, said P. D. Walsh had paid to defendant and its assignor Silar H. Bates the sum of seven hundred eighty-two and 21-100 dollars ($782.21) upon said contract, and plaintiff then was ready and willing to pay said taxes and perform all the terms of said contract on her part to be performed by the terms thereof; and prior to said date said P. D. Walsh and this plaintiff had kept and performed all of the terms of said contract by them to be performed.

11. That the lands named in said contract were, 16 at the time of the execution thereof, and at all times subsequent thereto, and now are, unimproved, vacant and unoccupied, and plaintiff has never taken possession thereof.

12. That since the execution of said contract said land has greatly increased in value and will continue to so increase, and at the time said Selover, Bates & Company renounced and repudiated said contract as aforesaid, said land was of the value of five thousand, seven hundred and sixty 17 dollars ($5,760.00).

13. That defendant now claims that plaintiff has lost all her rights and equities or interests in said land and forfeited all payments made upon said contract, and defendant claims the right to sell said land to some innocent purchaser without notice of said contract, or of plaintiff's rights or interests therein, or in said land, and plaintiff is informed and believes and so alleges that defendant has sold said land to some third party.

Wherefore, plaintiff prays for the judgment and 18 decree of this court:

1st. For the sum of five thousand, three hundred eight and 21-100 dollars ($5,308.21), with interest at the rate of six per cent per annum on $225.00 thereof since the 26th day of January, 1903; with interest at the rate of six per cent per annum on $219.44 thereof since the 1st day of November, 1904; and with interest at the rate of six per cent per annum on $209.90 thereof since the 1st day of November, 1905; and with interest at the rate of six per cent per annum on $127.87 thereof

since the 1st day of November, 1906; and with interest at the rate of six per cent per annum on $4,526.00 thereof since the 5th day of March, 1907. 19

2nd. And for plaintiff's costs and disbursements herein.

Dated August 29th, 1907.

A. B. CHOATE,
Attorney for Plaintiff,
710 Temple Court,
Minneapolis, Minn.

Filed Dec. 2, 1907, A. E. Allen, clerk, by F. S. Cady, deputy. 20

Due and personal service of the within amended complaint is hereby admitted at Minneapolis, Minn. on this 9th day of August, 1907.

ARTHUR W. SELOVER,
Defendant's Attorney.

EXHIBIT "A".

Land Contract No. 97 A.

This agreement, made this 26th day of January, A. D. 1904, between Silas H. Bates, unmarried, as party of the first part, and P. D. Walsh, of the county of Stuttsman, in the state of North Dakota, the party of the second part. 21

Witnesseth: That said first party for and in consideration of the payment to him of the sum of Two Hundred Twenty-five ($225.00) dollars, on the delivery hereof (the receipt whereof is hereby acknowledged), and in consideration of the covenants and agreements of the party of the second part, hereinafter written, subject however to the exemp-

tions, reservations and conditions hereinafter written, has agreed to sell to said party of the second part, for the sum of twelve hundred thirty-four ($1234.00) dollars and upon the strict, exact and punctual performance, by the said party of the second part, of each, every and all of the covenants and agreements on his part herein written and by him to be kept and performed, and subject also to the exceptions, reservations and conditions below written to make and deliver upon the surrender of this agreement by the said party of the second part, a good and sufficient deed, with ordinary covenants of warranty, conveying to said party of the second part, in fee simple, the following described real estate, to-wit:

Section No. five (5), of township No. (14), S. of range No. (50), West of the Sixth Principal Meridian, containing, according to the United States survey Six Hundred Forty (640) acres, be the same more or less, situated in the county of Cheyenne, in the state of Colorado, excepting and reserving:

First: All oil, coal and other minerals within or underlying said lands.

Second. The exclusive right to prospect in and upon said land for oil, coal and other minerals therein, or which may be supposed to be therein and to mine for and remove from said land all oil, coal and other minerals which may be found thereon by any one; and

Third. The right of ingress, egress, and regress upon said land, to prospect for, mine and remove any and all such oil, coal, or other minerals, and

the right to use so much of said lands as may be convenient or necessary for the right-of-way to and from such prospect places, or mines, and for the convenient and proper operation of such prospect places, mines and for roads and approaches thereto or for removal therefrom of oil, coal, mineral machinery or other material. 25

Fourth. A right-of-way of lawful width for any and all county roads heretofore established over, upon and across the premises herein described.

The exceptions, reservations, covenants and conditions hereinabove written shall each be written into the conveyance of said premises, which may hereafter be made, and shall run with the land. 26

In consideration whereof the said party of the second part has and does hereby covenant and agree to and with the party of the first part:

First. To pay him at the office of Selover, Bates & Company, at Minneapolis, Minnesota, as the remainder of the purchase price of said land, the gross sum of one thousand nine ($1009.00) dollars, with interest thereon, on the several dates and in the several amounts as follows: 27

	Day.	Month.	Year.	Principal.	Interest.
First Payment	1st	November	1904	$158.90	$60.54
Second "	"	"	1905	158.90	51.00
Third "	"	"	1906	86.40	41.47
Fourth "	"	"	1907	86.40	36.29
Fifth "	"	"	1908	86.40	31.10
Sixth "	"	"	1909	86.40	25.93
Seventh "	"	"	1910	86.40	20.75
Eighth "	"	"	1911	86.40	15.56

Ninth	"	"	"	1912	86.40	10.38
Tenth	"	"	"	1913	86.40	5.19

Second. To pay, at the time when by the law the same becomes due and payable, to the proper collecting officer, all taxes and assessments (special or general), which may be lawfully levied or assessed upon or against said lands, (including any such taxes or assessments levied for or during the year 1903 or subsequent years).

Third. That all improvements placed upon said premises shall remain thereon, and shall not—nor any part thereof—be removed or destroyed until final payment for said land; that he will punctually pay said sums of money above specified as each of the same becomes due.

Fourth. That time and punctuality are material and essential ingredients in this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the covenants and agreements aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall, at the option of said first party, become utterly null and void and all rights and interests hereby created, or then existing, in favor of the second party, or any one claiming under him, shall at the option of said first party, utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted, with all improvements and appurtenances, shall revert to and revest in, said first party with-

out any declaration of forfeiture or act of re-entry or any other act by said first party to be performed and without any right of second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made. The said party of the first part shall have the right, immediately upon the failure on the part of the second party to comply with the covenants and agreements herein written, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belonging. And the said party of the second part covenants and agrees that he will surrender unto the said party of the first part, the said land, improvements and appurtenances, without delay or hindrance, and no court shall relieve the party of the second part upon failure to comply strictly and literally with this contract.

In witness whereof, the said first party has executed these presents in duplicate and the second party hath hereunto set his name on the day and year above written.

S. H. BATES,
P. D. WALSH,
Purchaser,
Postoffice Address, Courtenay, N. Dak.

Witnesses—
GEO. H. SELOVER.

EXHIBIT "B"

Notice of Forfeiture of Land Contract.

To P. D. Walsh and any and all other persons hold-

ing or claiming to hold under him in respect to the land hereinafter described:

You and each of you are hereby notified that default has been made in the terms and conditions of that certain contract No. 97 A by and between Silas H. Bates and P. D. Walsh, covering section Five (5), Township Fourteen (14), Range Fifty (50), Cheyenne County, Colorado, which said contract has been heretofore duly assigned and set over unto Selover, Bates & Company, a corporation of the State of Minnesota, in this:

That the said P. D. Walsh and his assigns have wholly failed, neglected and refused to pay or cause to be paid at the time when by law the same became due and payable, to the proper collecting officer, the taxes and assessments, special or general, which were lawfully assessed and levied upon and against the said lands described in said contract, for the year Nineteen Hundred and Six (1906) or at all.

Now therefore, you and each of you are hereby notified that the undersigned has exercised the option given to said Bates and to it under the terms of said contract, to terminate the same upon the said default, and that the same has been terminated on account of such default, and is null and void.

SELOVER, BATES & COMPANY,
By Geo. H. Selover, Pres., and
By A. E. Bowe, Secretary.

In presence of
L. SELOVER.
(Corporate Seal)
(Verification by attorney.)

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District. 37

ELLA T. WALSH,

Plaintiff,

vs.

SELOVER, BATES & COMPANY, a corporation,

Defendant.

AMENDED ANSWER.

For its amended answer to the complaint of the plaintiff herein this defendant denies each and 38 every allegation contained therein not hereinafter specifically admitted or qualified.

First: Admits that it is a corporation organized under the laws of the state of Minnesota but denies that it was or became such before the first day of October, 1905.

Second: Admits the execution of the contract referred to in paragraph number two (2) of said amended complaint; but alleges that it was in fact executed on the 26th of January, 1905.

Third: Admits that the defendant paid to the 39 treasurer of Cheyenne county, Colorado, on or about the 2nd day of March, 1907, the taxes levied and assessed against the land described in said contract for the year 1906 in the sum of thirteen dollars and ninety-six cents ($13.96).

Fourth: Admits that it executed and caused to be served upon P. D. Walsh the paper marked Exhibit "A" and attached to said amended complaint.

Fifth: Admits that some time in April of 1907, a tender was made by Mr. A. B. Choate of the sum

of thirteen and 96-100 dollars ($13.96) and of the
40 cost to the defendant of the service of said Exhibit "A" upon said P. D. Walsh, and no more.

Sixth: Admits that the said P. D. Walsh had paid upon said contract prior to January 1st, 1907, the sum of $782.21 and no more.

Seventh: Admits the allegations of paragraph 11, of said amended complaint. Denies that at the time of the services of said notice, Exhibit "B" the land covered by said contract was worth the sum of five thousand seven hundred sixty dollars ($5760)
41 or any other or greater sum than six and 75-100 dollars ($6.75) an acre.

For a separate and farther defence hereto the defendant alleges: That prior to the first day of January, 1904, the said Silas H. Bates purchased from the Union Pacific Land Company sections five (5), seven (7), nine (9), township fourteen (14), south of range fifty (50) west of the sixth principal meridian in Cheyenne county, Colorado, upon a land contract which was duly issued to said Land Company to said Bates.

42 That thereafter and before the commencement of this action the interest of said Bates in said lands and in said contract Exhibit "A" became the property of the defendant herein by due and proper conveyances or assignments.

That said contract so issued to said Bates by Union Pacific Land Company contained the following provisions, to-wit: requiring said Bates, "To pay, at the time the same become due and payable, to the proper collecting officer, all taxes and assessments (special or general), which may be lawfully

levied or assessed upon or against said lands (including any such taxes or assessments levied for or during the year 1904, or subsequent years)." 43

"That time and punctuality are material and essential ingredients in this contract. And in case the said purchaser shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the covenants and agreements aforesaid, strictly and literally without any failure or default then this contract, so far as it may bind said Land Company, 44 shall become utterly null and void and all rights and interest hereby created, or then existing, in favor of the said purchaser, or any one claiming under him shall utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted, with all the improvements and appurtenances, shall revert to, and revest in, said Land Company without any declaration of forfeiture or act of re-entry or any other act by said Land Company to be performed, and without any right of said purchaser of recla- 45 mation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made. The said Land Company shall have the right immediately upon the failure on the part of the said purchaser to comply with the covenants and agreements herein written, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belong-

ing. And the said purchaser covenants and agrees
46 that he will surrender unto the said Land Company, the said land, improvements and appurtenances, without delay or hindrance, and no court shall relieve the said purchaser upon failure to comply strictly and literally with this contract."

That the said caused to be included in the contract in suit each and every clause respecting forfeiture and termination of said contract that was to be found in the contract entered into by said Bates with the Union Pacific Land Com-
47 pany and that said agreement as to said termination was rendered absolutely necessary to the said Bates on account of the existence of the same in the said contracts with the Union Pacific Land Company and for this reason he was compelled to and did include in said contract the same clauses respecting forfeiture and termination as were to be found in the said Union Pacific contracts.

That in entering into said contracts with said defendant the said Bates did rely upon the agreements therein contained as to forfeiture and ter-
48 mination as a waiver on the part of said defendant of any and all statutory or other rights which he said defendant, might otherwise have as to notice of termination after default and as to all matters respecting his rights in case of a default; and that unless and until said Walsh and all other purchasers from said Bates agreed fully and freely to said provisions respecting the termination of said contract said Bates did refuse expressly to sell said lands or any of them for any price whatsoever or to make any contract in respect thereto whatsoever;

and that said sales or either of them would not 49
have been made to the said plaintiff at all had he not fully agreed to the said provisions and all thereof; and that said Bates made said sales and both thereof in reliance upon such right of cancellation and termination and not otherwise.

That at and prior to the time of making of said contracts with defendant said plaintiff was fully informed and had full knowledge and notice of each and all facts above set forth and knowingly and willingly made and entered into said contract including said provisions for its termination and 50
should be and is estopped to assert that the same are not binding upon him, for any reason whatsoever.

That thereafter or prior to the 1st of January, 1907, the said Union Pacific Land Company did notify the defendant in respect to the said contract and the payment of the taxes falling due under the laws of Colorado each year that it, the said Union Pacific Land Company, did require the defendant to pay all taxes before they became delinquent, and that in case such taxes thereafter were permit- 51
ted to become delinquent and were not paid by the said defendant that it, the said Union Pacific Land Company, would forthwith cancel said contract under the terms thereof.

That under and by virtue of the laws of the state of Colorado there became due and payable upon the said section five (5) certain taxes lawfully levied and assessed against the same for the year of 1904, the sum of nine and 23-100 dollars, ($9.23); that the same under said laws became due and payable

52 on the first day of January, 1905, and that the said taxes became delinquent under the law of said state of Colorado on the 1st day of March, 1905; and that the said P. D. Walsh was and all times since has been in default in respect to the non-payment of said taxes and that the same has never been paid by said Walsh or the plaintiff.

Defendant further alleges that the taxes duly levied and assessed under the laws of Colorado upon said section for the year 1905 became similarly due on the 1st day of January, 1906, for the sum of
53 eight and 19-100 dollars ($8.19), and being unpaid became delinquent on the first day of March, 1906, and that the same has never been paid by or for the said P. D. Walsh or this defendant; but that on the contrary since said time the said P. D. Walsh has been in default under the terms of said contract on account thereof.

That under the laws of the state of Colorado there became due and payable on the first day of January, 1907, taxes upon said section which were duly levied and assessed under said laws amount-
54 ing to $13.96 and that the same were unpaid on the 1st day of March, 1907, and became thereby delinquent under said laws and that the same were never paid to the collecting officer by or for the said P. D. Walsh or this plaintiff.

As a further defence the defendant alleges; the agreement respecting the payment of the taxes and termination for default on the part of the said P. D. Walsh and contained in said contract Exhibit "A" was of and entered into the consideration for the making of said contract; that without such

agreement on the part of said Walsh the said Bates would not have executed or entered into said contract or sale at all and in entering into said contract he relied upon said agreement respecting termination and forfeiture contained therein. 55

Defendant further alleges that the plaintiff herein is and at all times herein mentioned was the wife of the said P. D. Walsh; that said plaintiff at all times herein mentioned had full notice and knowledge of all and several the facts hereinabove alleged; that at all times herein and in the complaint mentioned, plaintiff was the equitable owner of 56
the said contract designated as Exhibit "A" in the complaint herein, and that in all matters relating to the execution and delivery of the said contract and in all matters affecting its performance and nonperformance in all matters herein above alleged the said P. D. Walsh was and in all respects acted as the undisclosed agent of plaintiff, and took and held the said contract in his own name in trust for her.

Further answering and for a set-off and counterclaim herein defendant alleges that on or about No- 57
vember 6th, 1906, the plaintiff through P. D. Walsh, her duly authorized agent in that behalf, made and executed in the name of the said P. D. Walsh but in fact for and in behalf of the said plaintiff and at her request and for her benefit a contract wherein and whereby defendant was given the right to sell the lands described in the complaint herein from the date of such contract until April 1st, 1907, for $5.00 per acre net to plaintiff and that defendant in conisderation thereof did promise and agree

to undertake the sale thereof and to use its best efforts to sell the same within said perior, and plaintiff agreed to pay and defendant agreed to accept for its services and as its commission such sum as it should sell said land for, over and above the said net price of $5.00 per acre, and that pursuant to said contract on or about the first day of February, 1907, did sell the said land for the sum of $6.75 per acre, and so notified the said P. D. Walsh at the same time enclosing and tendering a portion of the purchase price which was by said Walsh refused and returned to defendant; and that thereupon the said Walsh renounced and repudiated the said contract and notified defendant that the said land had been sold by him; and that in all matters and dealings in respect to such sale and the repudiation thereof the said P. D. Walsh was in all respects the duly authorized agent of the plaintiff herein and acted for her but used his own name throughout with plaintiff's knowledge and consent, for the purpose, as defendant verily believes, of concealing from defendant the plaintiff's connection with and interest in the said transaction; and that defendant had no knowledge or notice of plaintiff's interest in the said contract or in the said lands prior to the commencement of this action. Defendant further alleges that no part of said commission has ever been paid and that defendant has been damaged accordingly in the sum of $1120.00 with interest at the rate of 6% per annum from February 1st, 1907.

Wherefore, defendant demands judgment against plaintiff that she take nothing by this action and

that defendant have judgment against plaintiff for the sum of one thousand one hundred twenty dollars ($1120.00) with interest at 6% per annum from Feb. 1st, 1907, and its costs and disbursements herein; and that in case plaintiff recovers judgment against defendant herein, that there be set off against the same the sum of $1120.00 with interest at 6% per annum from Feb. 1st, 1907, and that defendant have judgment against plaintiff for any excess in its favor. 61

ARTHUR W. SELOVER,
Attorney for Defendant, 62
923 Metropolitan Life Bldg.,
Minneapolis, Minn.

STATE OF MINNESOTA,
County of Hennepin.

Arthur W. Selover being first duly sworn on oath says that he is the attorney for the defendant in the above entitled action, that he has read the foregoing answer and knows the contents thereof and the same is true to the best of his knowledge, information and belief and that the reason this verification is not made by the defendant is that the said 63 defendant and all of its officers and agents are absent from the County of Hennepin aforesaid, wherein resides this affiant its attorney.

ARTHUR W. SELOVER.

Subscribed and sworn to before me this 27th day of November, 1908.

JAY W. CRANE,
Notary Public,
Hennepin County, Minnesota.

My commission expires Dec. 31, 1912.

Service of the within amended answer by copy
64 is hereby admitted at Minneapolis, Minn., this 30th day of November, 1908.

A. B. CHOATE,
Attorney for Plaintiff.

Filed Jan. 7, 1909, A. E. Allen, clerk, by F. S. Cady, deputy.

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

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65 ELLA T. WALSH,
Plaintiff,

vs.

SELOVER, BATES & COMPANY, a corporation,
Defendant.

REPLY TO AMENDED ANSWER.

For reply to the amended answer of defendant herein, plaintiff denies each and every allegation and thing therein contained, except as the same is alleged in the amended complaint herein.

66 Wherefore, plaintiff demands judgment as prayed in her amended complaint herein.

Dated December 2nd, 1908.

A. B. CHOATE,
Attorney for Plaintiff,
710 Temple Court,
Minneapolis, Minn.

STATE OF MINNESOTA,
ss. 67
County of Hennepin.

A. B. Choate being first duly sworn on oath says that he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing reply and knows the contents thereof and that the same is true to the best of his knowledge, information and belief, and that the reason this verification is not made by the plaintiff is that the said plaintiff is absent from the county of Hennepin aforesaid, wherein resides this affiant her attorney.

A. B. CHOATE. 68

Subscribed and sworn to before me, on this 2nd day of December, 1908.

ADA C. TAINTOR,
(Notarial Seal) Notary Public,
Hennepin County, Minn.

My commission expires April 11, 1910.

Endorsed: State of Minnesota, County of Hennepin, District Court, Fourth Judicial District. Ella T. Walsh, plaintiff, vs. Selover, Bates & Company, a corporation, defendant. Reply to amended answer. A. B. Choate, attorney for plaintiff, 710 69
Temple Court, Minneapolis, Minn.

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

ELLA T. WALSH,
Plaintiff,
vs.
SELOVER, BATES AND COMPANY,
Defendant.

SETTLED CASE.

70 The above entitled cause came on for trial and was tried on the 6th, 7th, 8th and 11th days of January, A. D. 1909, before Hon. Andrew Holt, one of the judges of said court, with a jury; A. B. Choate, Esq., appearing for plaintiff and Arthur W. Selover for the defendant, when the following proceedings were had:

Jury selected and sworn January 6th, after which this court adjourned.

Pursuant to adjournment the court convened at
71 10 A. M. January 7th, 1909.

GEORGE H. SELOVER,

called for cross examination under the statute after being first duly sworn, testified as follows:

Examined by Mr. Choate:

Q. Your name is George H. Selover, is it not? A. Yes, sir.

For the purpose of this settled case the parties herein agree that the following are facts:

The terms and conditions contained in Exhibit
72 A, attached to the complaint herein, were agreed upon between P. D. Walsh and the members of the firm of Selover, Bates & Company at the city of Minneapolis, Minnesota, in the office of the Selover, Bates & Company, a partnership consisting of Chas. W. Bibb, Silas H. Bates and George H. Selover, on the 26th day of January, 1904, and thereupon at said time and place said contract was drawn up in duplicate and left at Minneapolis, Minnesota, unsigned, with Selover, Bates & Company. Said contract, Exhibit A, was agreed upon at that

time for the purpose of selling to P. D. Walsh, Section 5 therein described in place of Section 7, Township 13, Range 46, in Cheyenne county, Colorado, theretofore sold to said Walsh. That said Walsh agreed to pay to said Selover, Bates & Company as a difference in value between said two sections the sum of fifty dollars ($50.00), which amount was to be paid before the delivery of Exhibit A and before the substitution of Section 5 for said other section should take place. 73

That on the 29th day of February, 1904, pursuant to said agreement, said P. D. Walsh, at Courtenay, N. D., at the request of Selover, Bates & Company, sent by mail to said Selover, Bates & Company, at Minneapolis, Minnesota, the sum of fifty dollars for the purpose of paying the consideration agreed upon for the exchange of said section. 74

That on the 3rd day of March, 1904, both copies of said Exhibit A were signed by said Bates, at the city of Minneapolis, Minnesota, and mailed to said P. D. Walsh, at Courtenay, N. D. That said Walsh received said instruments at said Courtenay, N. D., signed both of said contracts there, and returned by mail one copy thereof to said Selover, Bates & Company, at Minneapolis, Minnesota, as appears by Exhibits 2, 3, 4 and 5. 75

Subsequently to the execution of said contract and before the commencement of this action, defendant corporation succeeded to all the rights and liabilities of said Bates and said partnership under and pursuant to said contract. On the 5th day of March, 1907, defendant served upon P. D. Walsh notice of forfeiture of said contract which notice

76 is marked Exhibit B, attached to the complaint herein. That, at all times since the incorporation of defendant, George H. Selover, one of the witnesses herein, has been and now is, president of defendant corporation.

Q. And it was at that office and with that association of gentlemen that Mr. Walsh negotiated for Exhibit A? A. It was.

Q. Now, did Mr. Walsh make his payments promptly on this contract?

Mr. Selover: That is objected to as incompe-
77 tent, irrelevant and immaterial, but as to taxes I think that will be material probably.

A. What shall I answer?

(Question read by the reporter)—Exhibit A?

Mr. Selover: You are referring only to the payment of taxes I presume?

Mr. Choate: Not necessarily but other payments.

Mr. Selover: I object to it as incompetent, irrelevant and immaterial except in so far as it relates to the payment of taxes.

78 The Court: Objection overruled.

Mr. Selover: Exception.

(Question again read by the reporter). A. Part of them.

Q. All of them? A. I think not. I gave him a special extension at one time on one payment or part of another, I forget now exactly which.

Q. The contract provides for a payment on the first day of November, 1904, of $158.90 principal and $60.54 interest. Was that payment made on that date? A. I will have to look it up, Mr.

Choate—

79 Mr. Selover: Wait a minute before you answer it. That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Selover: Exception.

Q. Answer Mr. Selover. A. The payment called for by the contract on the first of November, 1904, for $158.90 principal and $60.54 interest was not made on that date.

Q. Can you tell me when it was made?

Mr. Selover: Same objection. 80

The Court: Same ruling.

Mr. Selover: Exception.

A. It was made as of date September 11th, 1905.

The Court: What date?

A. September 11th, 1905; it was paid the following September.

Q. When was the second payment provided by the contract to be made on the first of November, 1905, actually paid?

Mr. Selover: Same objection.

The Court: Same ruling. 81

Mr. Selover: Exception.

A. That was paid on the same day as the other in advance under a special arrangement made with Mr. Walsh some time before; one was made behind and the other in advance.

Q. The one due November 1st was made September 11th? A. 1905, yes, sir.

Q. The next payment payable in 1906, $86.40 principal and $41.47 interest required by the contract to be made the first of November, 1906, when

82 was that made?

Mr. Selover: Same objection.

The Court: Same ruling.

Mr. Selover: Exception.

A. Your question is when that payment was made?

Q. Yes. A. Well, I will answer the best I can. It wasn't paid to me but it was paid on time to our agent, the Trust Company, when it was due. I presume it was sent in on time; I never heard of any arrangement in regard to it nor of any delay.

83 Q. There is a letter from the Trust Company? A. Well, you had better show it to counsel, I know nothing about it.

Q. The Minnesota Loan and Trust Company was authorized to receive that payment, was it? A. It was.

Mr. Choate: I offer in evidence plaintiff's Exhibit F purporting to be a letter from the Minnesota Loan and Trust Company acknowledging the receipt of the third payment.

Mr. Selover: That is objected to as incompe-
84 tent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Now, there were some taxes which fell due upon this section after Exhibit A was made, which, by the terms of the contract, were to be paid by Mr. Walsh? A. I believe so.

Q. Can you tell me whether those were paid on time promptly by him? A. They were never paid at all.

Q. How many years of taxes payable by him were not paid? A. Well, it is hard for me to re-

member it; I know that he didn't pay the one that fell due March 1st, 1907, very well; we had several other contracts. 85

Q. I don't care to go into detail, but two or three payments of taxes were passed by his not paying them, so far as he was concerned they were not paid? A. Well, so far as I know he never certainly paid any to us and I don't think he paid them to the proper officers to collect them. My answer to that is mere hearsay.

Q. All you can say in regard to the taxes is, he never paid any taxes? A. That is not what I said, I said he never paid any to us and I believe he never paid any down there, but as to that I can't say of my own knowledge. 86

Q. You claimed at the time you served Exhibit S that there was due on this land for 1906, did you not? A. 1906. Yes, that is what the notice says.

Q. How much did you claim was due at that time for taxes?

Q. At the time you served notice of default, which has been introduced in evidence and read in evidence, upon Mr. Walsh you considered the contract Exhibit A at an end, did you not? A. Yes, I did— 87

Q. When I say "you" I mean the corporation? A. Yes, I did, at least at that time.

Q. And you have still since considered it at an end? A. Yes, and I still think so.

CROSS EXAMINATION.

By Mr. Selover:

Q. Counsel asked you whether you considered

88 the contract with Mr. Walsh at an end at the time you served or caused to be served this forfeiture and you said that you did; now state for what reason.

Mr. Choate: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. What reason I consider it to be at an end?

Q. Yes. A. Well, there are two reasons. If I understand your question, the reason that I consider that contract at an end is because in accord-
89 ance with its terms signed by him at the time he agreed that it should come to an end upon the happening of that contingency.

Q. What was the contingency? A. If he failed to pay taxes that became due in Colorado; they became due and he didn't pay them.

A. Thirteen dollars and something, whatever the pleadings state, I don't know, we admit it.

Q. Between the time you sold to Mr. Walsh and the time you gave this notice to terminate the contract the land increased considerably in value, did
90 it not, Section 5? A. It did somewhat increase in value.

Q. Plaintiff's Exhibit L shown witness. Is that your signature? A. Yes, sir.

Q. You wrote that letter, did you? A. Yes, sir.

Mr. Choate: You say here "that section"; I want to ask him what section he refers to.

Mr. Selover: We will admit, Mr. Choate, that the whole of that letter refers to section 5 so far as that part of it is concerned.

Mr. Choate: I offer that last line of page 1 and

the first line and to the end of that sentence on page 2 of Exhibit L, together with the date and signature. 91

Mr. Selover: We object to that as irrelevant, immaterial, also as incompetent and without any foundation, not referring to anything in issue in this case.

The Court: Objection overruled at this time.

Mr. Selover: Exception.

Mr. Choate (reading): "Courtenay, North Dakota, Nov. 8th, 1906, I would like to know something about the taxes on that section if you will 92 please let me know. P. D. Walsh."

PATRICK D. WALSH,

after being first duly sworn, testified as follows:

Examined by Mr. Choate:

Q. Your name is P. D. Walsh, is it? A. Yes.

Q. Where do you live? A. Courtenay, North Dakota.

Q. You are the person named here as the one who made a contract with Silas H. Bates for section 5 referred to? A. Yes, sir. 93

Q. Where were you when you made that contract? A. I was in the West Hotel.

Q. Did the defendant ever notify you, or Mr. Bates, of the amount of taxes due?

Mr. Selover: That is objected to as incompetent, irrelevant, immaterial and as an indirect attempt to vary the terms of this written contract, and under the contract and under all the evidence in the case the defendant was under no duty whatsoever to notify the plaintiff in respect to taxes or

any of them.

94 The Court: Objection sustained. That is, I don't understand that you claim there was any conversations between the defendant and Mr. Bates subsequent to that letter?

Mr. Choate: That means in any way.

Mr. Selover: Same objection as before.

The Court: If you have any conversations in regard to it you may show it; if there is any letter you may offer it.

Q. Did they subsequently ever say anything to

95 you about paying taxes?

Mr. Selover: Same objection.

The Court: Objection overruled.

A. After the contract was made?

Q. Yes, did they talk with you, ask you to pay the taxes or say anything to you about it? A. No, sir.

Q. Did you ever receive a letter from them concerning the matter? A. No, sir.

Q. Where were you when the notice, plaintiff's Exhibit G, was served upon you? A. I was in

96 Jamestown.

Mr. Selover: What state? A. North Dakota.

Q. How far is that from you home? A. About thirty miles.

Q. Where was your wife at that time? A. She was at home, at Courtenay.

Q. I will show witness plaintiff's Exhibit P. When was this executed by you? A. About the 7th of January according to the date on there; I can't remember it myself.

Mr. Choate: I offer in evidence Exhibit P.

Mr. Selover: We object to this as incompetent, 97
irrelevant and immaterial, furthermore it is at variance with the pleading.

The Court: The description of the property is correct, isn't it?

Mr. Selover: I presume it is.

The Court: Objection overruled.

EXHIBIT P.

"Know all men by these presents: That in consideration of two thousand five hundred dollars to 98
him in hand paid by Ella T. Walsh, of Courtenay, ...of Stutsman County in the State of North Dakota, the receipt of which is hereby acknowledged, the undersigned P. D. Walsh and .....his wife hereby sell, assign, transfer and set over unto the said Ella T. Walsh all their right, title, claim and demand in and to a certain contract for deed dated Jan. 26, 1904, between S. H. Bates as seller and P. D. Walsh as purchaser of the whole of section five (5) in township number fourteen (14) north, of range fifty (50) west of 99
the Fifth Principal Meridian in Colorado.

In testimony whereof, we have hereunto set our hands this 7th day of January, A. D. 1907.

P. D. WALSH.

Signed, sealed and delivered in presence of

.....

.....

100 STATE OF NORTH DAKOTA,
ss.
County of Stutsman.

Be it remembered that on this 8th day of February A. D. 1907, before me, a Notary Public, in and for said County and State, personally appeared P. D. Walsh and ..... his wife, known to me (or proved to me on oath of .....) to be the same person described in and that executed the foregoing instrument and ..... acknowledged to me that ..... executed the same.

101 JAMES A. COFFEY,
(Notarial Seal) Notary Public.
Stutsman County, N. Dak.

My commission expires April 17, 1911.

Q. This was made and delivered to your wife at the time of its date, was it? A. Yes.

Q. At that time was there anything owing by you to your wife?

Mr. Selover: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

102 Q. Since the execution of that contract have you owned or claimed any ownership in this land?

Mr. Selover: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. No, sir.

Q. When did you first see this land? A. In January, 1904.

Q. Is that the first time you were out there? A. Yes, sir, that was the first time I went out there.

Q. Was that before or after this contract was

made? A. That was before the contract was made. 103

Q. Who took you out there? A. Mr. Bates.

Q. State what at that time was the general situation in regard to settlement and improvements about there?

Mr. Selover: That is objected to as too remote and irrelevant.

The Court: Objection overruled.

A. There wasn't any.

Q. Were you on this section? A. Yes, sir.

Q. At that time how many houses were in sight? A. None only Mr. McIntyre's, a ranchman who 104 used to keep sheep, it was south on the siding.

Q. What do you mean by that? A. It was a side-track made by the company to throw in cars.

Q. When were you out there next?

A. In December 1907, I think it was.

Q. You may state what the condition then was in regard to improvements at that time?

Mr. Selover: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. How many times have you been out there? 105

A. I was out there in January, 1904, and in December, 1907.

Mr. Selover: Those were the only times? A. Yes, sir.

Mr. Choate: Do I understand it is too far from the date to show the situation that was there then?

The Court: Yes.

Q. Did you notify the defendant, Selover, Bates and Company, of the assignment to your wife? A. Yes, sir—

106 Mr. Selover: Just a moment. I want to object to that question. I ask that that answer be stricken out until I can put in an objection.

The Court: Well, you had better get the notification if it is in writing.

Q. How did you notify them? A. By letter.

Q. When? A. Some time the last of January or the first of February, but I think it was in February.

Q. What year? A. In 1907.

Q. Did you keep a copy of that letter? A. Yes,
107 sir.

Q. I will show the witness plaintiff's Exhibit Q. Is that your writing? A. Yes, sir.

Q. Is that your signature? A. Yes.

Q. What is this? A. That is a letter in answer to one that I received from Selover, Bates & Company.

Q. Where did you get that?

A. I got this in Courtenay; I got the letter they sent me in Courtenay.

Q. You say this is a letter you sent them?
108 A. I had it as a copy.

Q. This is a copy of the letter you sent them?

A. Yes; the letter I sent them I copied on to this one.

Q. Did you mail them the one of which you say this is a copy? A. Yes.

Mr. Choate: Exhibit Q offered in evidence.

Mr. Selover: We have no objection to this letter.

The Court: Received.

EXHIBIT Q.

Courtenay Nor Dak 109

Feb. 8-1907

Messrs Selover Bates Co

Draft

Dear Sir You of Reacent Dat at hand with Check for $100.00 Dollas it is at the Stutman Co Bank Sujet to your Order as I Turned that Land Over to My Wife on Jan 7-1907 for which I received $2500.00 and it was Shw how Told me to write you and have the Price of the Land Raised from $5.00 to $8.00 Per acer So I Told her what you Said in your Leter But She Said First She would not Sell 110 for that Price But I Finlley got her to Consint to take that Price but you will have to Pay her cash if you want it that is the Best I could Do for you I Jeust got Hom off the Rod and Expect to Leave hear Sunday So you will have to do Business with her Atorney at Ceurtenay his Name is A. J. Coffee he has the Contract also the Abstract My Wife has A relative how Lives in Leeds How Bought 2 Sections of the McIntire Estate and paied $6.00 Per acer for it and it Layes 12 miles South of the 111 Section I had that is 5-14-50 and that is where she got on the Inside So if you Do Not care to tak it it will be all Right I am on the Rod with a Machein and I had to have the Money So I Sold it to her you can writ A. J. Coffee for any Other infermation you want

You Rep

P. D. Walsh.

Q. You say this was written in answer to a letter that was written to you? A. Yes, sir. I wrote

112 them one before that though in January and never got an answer to it.

Q. I show the witness plaintiff's Exhibit K, look that over. Is that the letter to which you refer that that other was an answer to? A. Yes, sir.

Mr. Choate: Exhibit K offered in evidence.

Mr. Selover: There is no objection to that.

The Court: Received.

EXHIBIT K.

113 The George H. Selover Company
Lands and Investments
509 Andrus Building
Minneapolis, Minn., Feb. 6, 1907.

Mr. P. D. Walsh,
Courtenay, N. D.

Dear Sir:—

I beg to report that I have sold your section 5-14-50 on the basis of our agreement between us, and enclose you herewith check for $100 paid by the purchaser. The contracts have been made out and
114 forwarded to them for execution and in the course of a short time will be back, with the balance of the first payment. Kindly acknowledge receipt.

Just as soon as the papers and the balance of the funds come back, I will immediately communicate with you and we will arrange the matter of the other payments.

Yours truly,
Geo. H. Selover.

G. H. S.——Enc.

EXHIBIT 4.

Courtenay No Dak
Feb 29-1904.

Msff Selover & Bates Co.

Dear Sir Enclosed find Draft for 47 Dollas and Stamps for 50 ct Also Express Bill for samples sent to me by Mr. Smith of Cheyenne Wells of Millet Broom Corn etc and you said you wold Pay for it $2.40 Express & 10 ct Delivery and 47.00, making $50.00 in all that I was to Pay you between the First Section I had and the one I changed for while I was in Minneapolis Pleas Send me contract Pleas Send contract as you a greaded to

I have 3 Parties how as going down on March 15 to Buy Land Names as W. Walks, Thomas Suchla and Ben Thosgard there has one gon from hear and was to Make a trip on March First Frank Bestosic

over

I had them to look over the Samples and they liked them very much they came in good Shape will have some more after a While I expect a Man hear to Day to have a talk withe Me and to See the Samples his names is G. W. Howster he expect to go their and Look the Couty Over and if Every thing is Favorable he will Lod a car hear and Move Down their this Spring ar you going to Seed any Land their this Spring if so I wold Like to go Down their the Lates Part of June and will Bring a Party of 3 or 4 More withe Me at that Time if you could get Me Free Transportation for My Self Hoping to hear from you in regard to this I Reman Yours

Resp
P. D. Walsh.

EXHIBIT 5.

118 Courtenay Nor Dak
Feb. 25-1904.

Msff Selover Bates & Co

Dear Sir Your Feb 25 at Hand will Say in Reply that I have Brn in Montana Since left on a Sick Call Returned Home on the 24 in Regard to the Ballance on Sect 5-14-50 will Send it to you on or before Marck 15 as I have Some Money Dew Me March 10 as I had to Spend all My Surplus Change Something I Did not expect when I Lef Minne-
119 apolis and Money is very Scarce in this Country at this time I had 3 Parties on the String to go to Colrado on the 2 of Febury But it Seames they Did not go they Told me that Money was to hard to get and that they wold Put it off until a nother Time. I think there will be Some going Next June But not before as they want to go when everything is green I Received Samples from Smith and they Look good the weather has ben very Cold & Blustery Ever Since I came Back So they Say wheather very cold in Montana Will Do all I can for Colo-
120 rado. Some of them Thinks that Countrey no good as it wold have ben Settled before.

No More I Remain you

Resp

P. D. Walsh.

EXHIBIT 2.

Minneapolis, Minn., Feb. 25, 1904.

Mr. P. D. Walsh,
Courtenay, N. D.

Dear Sir:—

In looking over the files, we find your contract

which was re-written to cover section 5-14-50 instead of the one you had selected up North. When you were here, you arranged to send a check for the $60, the difference between the two sections and will leave the old contract as it stands. 121

Kindly let us hear from you.

Yours truly,

Selover, Bates & Co.,

By.....

EXHIBIT 3.

March 3, 1904.

Mr. P. D. Walsh, 122

Courtenay, N. D.

Dear Sir:—

Your favor received with $47.50 and memorandum of charges, but you do not send us express bill. Still, we do not care much about that. The recollection of the writer is that the difference between the sections was $60, but he supposes that you are right and will refer the matter to Mr. Bates when he gets back. We enclose you contracts as agreed and if you have not already turned in your contract on section 7, please send it to us at once, with 123 one of these signed. We have not sent anything to Mr. Frank Bestoric but hope he will come and see us.

Be sure and get your people ready for the 15th as we are going to have a very large crowd. We took out 16 this week.

We note what you say about selling your land and will list it accordingly.

Yours truly,

Selover, Bates & Co.,

By.....

P. D. WALSH,

124 recalled for further cross examination.

Mr. Selover continuing:

Q. Showing witness Exhibit Q, I want you to state, Mr. Walsh, if that is not the original letter instead of a copy? A. No, sir; I think I sent you one and kept one.

Q. You and your wife had Mr. Coffey write a letter on the same day, did you not? A. No, sir; I wasn't there; I don't know whether Mr. Coffey wrote a letter or not, I don't know anything about

125 it.

Q. You didn't instruct him to write anything?

A. No, sir.

Q. Nor your wife? A. Not within my knowledge.

Q. Did you not write this letter as an original letter and then went to Mr. Coffey, he advised you not to send it, and then returning the $100 that was sent in this letter? A. No, sir.

Q. Then this letter wasn't mailed to Selover, Bates and Company? A. Not that one, but there

126 was just one like it sent by myself.

Q. You are positive of that? A. Yes, sir; I never heard from it; I also wrote one in January I never heard from.

Q. Calling your attention to the letters Exhibits 4 and 5 have you copies of them? A. I don't know whether I have or not, I couldn't find them. We had a little fire up there and it burned up some of our stuff.

Q. Isn't it a fact that you haven't any copies of these letters between you and Selover, Bates and

Company except Exhibit Q? A. Well, I don't know. The fact of selling this place made me keep a copy of this one letter. 127

Q. Your deposition was taken, was it not, in this action on the 24th of September, 1908? A. Yes, sir, some time about that time.

Q. At Courtenay, North Dakota, before George E. Bouer, justice of the peace? A. Yes, sir.

Q. That is your signature at the base of the deposition, is it not? A. Yes, sir.

Q. Before testifying in that matter you were duly sworn to tell the truth and the whole truth? 128

A. Yes, sir, to the best of my knowledge.

Q. Were you not asked on that examination at that time this question: "Do you remember receiving a letter from the defendant in February, 1907, and enclosing a check of $100 on account of said sale?" A. Yes, sir, I remember that—

Mr. Choate: Wait a moment. That is objected to as incompetent.

The Court: Objection overruled.

Q. And you answered that question, "Yes, sir, I got them both about the same day"? A. Both what? 129

Q. The letter and the check? A. Yes, I guess the letter and the check together.

Q. Were you not asked at that time this question: "Did you give directions that the check be returned?" A. I think I was.

Q. And did you not answer, "Yes, sir"? A. Yes, from the instructions of my wife.

Q. Did you not answer "Yes, sir"? A. Yes.

Q. Were you not then asked, "What direc-

130 tions?" A. I don't remember.

Q. And did you not answer, "To return it as it wasn't according to contract"—that was your answer, was it not? A. Yes, I guess that is right.

Q. Were you not then asked, "Was that the only reason?" and did you not reply, "Yes, sir, and that the land wasn't for sale at that time"? A. That was what only reason—what was the reason?

Q. I am asking you now after you had stated here and in this deposition that you had given directions to return the money because it wasn't ac-
131 cording to contract, that you were then afterwards asked, "Was that the only reason," and you answered that, did you not, "Yes, sir, and that the land wasn't for sale at that time"? A. Yes, sir; it wasn't for sale by me.

Q. You do not have to guess about it, do you?

A. No, it wasn't by me for sale.

Q. Then were you not asked, "The letter with check was received on the 8th of February, 1907 and returned on that date?" and did you not answer, "I do not know whether it was in March or
132 February but think it was sometime between the 5th and the 15th of February"—that is true, is it not? A. Yes, sir.

Q. You so testified? A. Yes, sir.

Q. Were you not then shown what was Exhibit A. To this deposition that is the assignment to your wife, and were you not asked this question: "Who made out this contract marked Exhibit A?" and did you not answer, "Mr. Coffey"? A. I don't know, if I did I might possibly err, he approved the assignment of it.

Q. Were you not then asked, "Meaning the same J. A. Coffey residing at Courtenay?" and did you not answer, "Yes, sir"? A. Yes, sir, he approved it. 133

Q. Were you not asked this question: "How long prior to the date of this instrument has he been your attorney?" and did you not answer, "For the last three or four years whenever I needed any advice? A. Yes, sir.

Q. Were you not then asked this question: "At whose request did he make out this paper?" and did you not answer, "At the request of myself and my wife"? A. Well, I don't know as I understand. 134

The Court: Did you so answer that question when put in the deposition? A. I guess I did if it is there.

Q. You did so answer that question, did you not? A. There is two parts to that contract.

Q. I am asking you directly were you not asked this question and did you not answer this question as stated here? A. I guess I did if it is there, I was there under oath.

Q. Were you not then asked this question: "Do you mean to say that Mrs. Walsh personally requested this of Mr. Coffey?" and did you not answer, "No, sir, I conferred with her"? A. Yes. 135

Q. Were you not then asked this question: "Then you alone went to Mr. Coffey and asked him that this be drawn," and did you not answer, "Yes, sir"? A. Yes, sir.

Q. Were you not then asked this question: "You did that after you had been notified by the defendant that they had made a sale of land?" and

136 did you not answer, "I did that when I received a check of $100"? A. Yes.

Q. And were you not asked, "After it was received?" and did you not answer, "Yes, sir"? A. Yes, sir.

Q. Now, after having had your mind refreshed, Mr. Walsh, by this testimony, which you have given in this deposition and admitted that you gave, isn't it true that this letter Exhibit Q was never sent to the defendant by you but that you held it yourself— A. No, sir, I wrote one just as it states there,

137 I don't know what Mr. Coffey wrote.

Q. Well, he wrote as he was instructed, didn't he? A. No, sir, I never saw Mr. Coffey's letter, I don't know what he wrote at all.

Q. You are a resident of North Dakota? A. Yes.

Q. Of Courtenay of that state? A. Yes.

Q. How long have you been a resident of that state? A. About twenty-six years.

Q. Continuously? A. No, not all the time, I have been in Montana three or four years.

138 Q. But with that exception you have been a resident for twenty-six years of North Dakota and are at this time? A. I located in Courtenay in '96 right in the village.

Q. The plaintiff in this action is your wife, is she not? A. Yes, sir.

Q. How long has she been married to you? A. 1889.

Q. She is also a resident of North Dakota, is she not? A. Yes.

Q. And has been since that date? A. Yes, sir,

with the exception of while she was in Montana there. 139

Q. Where were you when you received this letter from the defendant enclosing the $100 check?

A. I think I arrived in Courtenay that same day or the day before, I don't know which.

RE-DIRECT EXAMINATION.

By Mr. Choate:

Q. What is your business? A. Farmer.

Q. Do you own a farm there? A. Yes, sir.

Q. You said you wrote them a letter in January, 1904, and never received an answer to that? 140

A. Yes, sir; I wrote them from Leeds, North Dakota.

Q. What was it about?

Mr. Selover: That is objected to as incompetent, irrelevant, immaterial and not the best evidence.

The Court: Objection sustained.

Q. In speaking of this assignment to your wife, dated January 7th and acknowledged February 8th, you said that it was in two parts? A. Yes, sir.

Q. What do you mean by that? 141

Mr. Selover: That is objected to as incompetent, the letter shows for itself.

The Court: Objection sustained.

Q. Can you recall how you came to have the instrument acknowledged?

Mr. Selover: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. What did you mean by referring to two parts of that instrument?

142 Mr. Selover: That is objected to as irrelevant, immaterial and calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Choate: Note an exception.

Q. In your deposition to which your attention was called by defendant's attorney you say that you went alone to Mr. Coffey to have this drawn, and you say that you did that after you had been notified by the defendant of a sale of the land, you were asked if you did that and you said you did that
143 when you received a check for $100; now to which part of this assignment did you refer to as being drawn after you received the check?

Mr. Selover: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Mr. Walsh, when was the assignment acknowledged relative to the time you received the check?

Mr. Selover: That is objected to, the assignment speaks for itself and the acknowledgment.

144 The Court: Just ask your question about that.

Mr. Choate: I ask him now when the acknowledgment was made.

The Court: It shows on its face when it was made.

Q. Do you remember when you received that check for $100? A. I couldn't say, no, sir, I couldn't remember the date, I don't know.

Q. Do you remember whether it was before or after the acknowledgment of the assignment?

Mr. Selover: That is objected to as incompetent,

irrevelant and immaterial.

145

The Court: Objection overruled.

A. I think I received the check after the acknowledgment.

Q. You think you received it after the acknowledgment? A. Yes; I couldn't say, I don't know because it has passed my memory at this time; whether it was received at the time or just before or just after it I couldn't say, I couldn't say.

Q. When was that assignment executed relative to the date of its acknowledgment?

Mr. Selover: That is objected to as irrelevant, 146
immaterial, the paper itself is the best evidence.

Q. Well, when was it signed by you? A. In January, about the 7th of January, the first week—

Mr. Selover: We have an objection in there; I move this be stricken out until the objection is made.

The Court: It may be stricken out.

Mr. Selover: We object to this testimony as incompetent, irrelevant, immaterial and, further, it is leading and calling for a conclusion of the wit-
ness. 147

The Court: Objection overruled.

Mr. Selover: Exception.

(Last question read by the reporter). A. Some time the first week in January, I think it is the 7th if I remember right.

RE-CROSS EXAMINATION.

By Mr. Selover:

Q. You state that your recollection isn't very clear on that as to dates? A. No, sir; it is not.

148 Q. Your recollection on the 24th of September, 1908, when you took this deposition and swore to these facts in here was more clear and distinct than it is at this time, was it not?

Mr. Choate: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. No, sir, I couldn't say as they are.

Q. You don't know whether your recollection was better then than it is now? A. No, sir, I couldn't say.

149 Q. Now, you have testified three different ways on this proposition, which one is true?

Mr. Choate: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. When you testified in the taking of this deposition on the 24th day of September, 1908, that that assignment wasn't made until after the check was received you were telling the truth then, were you not? A. I don't know; I guess I told them at that time I didn't know; I told them at that time

150 my recollection wasn't very good about it, I couldn't be sure.

(Court adjourned).

Pursuant to adjournment the Court convened at 10 A. M., January 8th, 1909.

RE-DIRECT EXAMINATION.

By Mr. Choate:

Q. In your deposition from which the defendant read yesterday and in the part read you were quoted as saying that the assignment was executed

on February 8th I believe.

151

Mr. Selover: I think that testimony wasn't to that effect.

Q. I ask the witness what you understood by the word "executed" in this deposition?

Mr. Selover: That is objected to as incompetent, irrelevant, immaterial and calling for a conclusion.

The Court: Objection overruled.

A. Your Honor, I would like to ask you a word for myself. Now if the attorneys will use the word acknowledge or assign—

Q. Answer the question. A. I supposed it 152
meant to mean "acknowledged," that is the way I understood the term.

Q. I understand you then to say that you said it was executed after you received the $100 check, you mean it was acknowledged? A. Yes—

Mr. Selover: That is objected to as incompetent irrelevant and immaterial.

The Court: I think this last question and answer should be stricken out.

Q. Mr. Walsh, your wife is at home sick, is she?

153

A. Yes, sir.

Q. Unable to be here? A. Yes, sir.

Mr. Choate: I ask that the complaint be amended with regard to the date of the execution of Exhibit A, the copy of the contract which I had read January 26th, 1903, which was the printed form, and the copy which they kept was changed to 1904, and it is agreed that 1904 was the date.

Mr. Selover: I don't think I have any objection to that; at least I have no objection to the complaint being amended to conform to the proof.

154 The Court: It may be so amended.

Mr. Choate: The other amendment is that in their copy of Exhibit A the printed portion provides that Mr. Walsh should pay the taxes of 1903, and I understand it is agreed that should be 1904, and I ask that may be so amended.

Mr. Selover: That may be, we don't object to that.

It is agreed and admitted that, if plaintiff is entitled to a verdict for any amount, the evidence adduced upon the trial upon the question of dam-
155 ages was sufficient to sustain the verdict for the amount rendered.

Mr. Choate: Plaintiff rests.

By Mr. Selover: Defendant at this time moves for an instructed verdict in its favor on the matters set up in this amended complaint and all thereof upon the ground, first, that the complaint does not state a cause of action against this defendant for anything whatever; on the ground, second, that under the evidence as it stands the plaintiff is not entitled to recover anything whatever of this de-
156 fendant; on the further ground that the contract sued upon is shown conclusively on the plaintiff's case to have become a contract in the state of North Dakota and not in the state of Minnesota; on the further ground that the statute of this state of Minnesota requiring thirty days notice to be given before such contracts made in this state concerning land therein may be terminated by the seller does not apply to this contract; on the further ground that if such statute or any law of the state of Minnesota should be held to apply to this con-

tract that the same is unconstitutional and void, upon the ground, first, that it deprives the defendant of its property without due process of law, in violation of the constitution of Minnesota and the bill of rights thereof, also that it deprives the defendant of its property without due process of law in violation of the constitution of the United States and the bill of rights therein set forth, being portions of the 14th amendment of the constitution of the United States, that it is further unconstitutional under both said constitutions in that it denies to the defendant the equal protection of the laws. 157 158

(Recess 12 to 2 P. M.)

The Court: Motion denied.

GEORGE H. SELOVER,

recalled.

Examined by Mr. Selover.

Q. You are the president of the defendant corporation? A. Yes, I am.

Q. Do you know Mr. Walsh? A. I do.

Q. Have you met his wife, the plaintiff in this case? A. I have seen her, met her. 159

Q. Did the defendant corporation have any correspondence with Mr. Walsh relating to a sale for him of this Section 5? A. Yes, sir.

Q. Showing witness plaintiff's Exhibit L, which has already been identified by Mr. Walsh, I will ask you if that is the correspondence you referred to regarding this matter? A. That is part of it; there was a letter which called this forth and one which answered it.

Q. Which preceded it? A. Yes.

160 Q. This letter is part of the correspondence received by you in the due course of mail? A. Yes.

Q. Calling witness' attention to plaintiff's Exhibit H, I will ask you if that is one of the letters comprising the correspondence between your company and Mr. Walsh on this matter? A. It is.

Q. Was that sent in due course of mail to Mr. Walsh, plaintiff's assignor? A. Yes.

Q. I will ask you to examine plaintiff's Exhibit I, and state whether or not that is another piece of correspondence between your company and Mr.

161 Walsh regarding this matter? A. The last clause of it has relation to this, the last clause of it, the last sentence I mean.

Q. Was there any other correspondence than these three letters except the Coffey letter? A. There is; there is a letter of February 6th I think.

Q. Calling your attention to plaintiff's Exhibit K, I will ask you if that is a letter written in this connection to the plaintiff's assignor regarding the sale of this property? A. Yes, it is.

Mr. Choate: If that is for anything further than

162 to identify the letters I object to it. If it is intended to have that testimony show anything different from what the letters show, I object to the testimony as incompetent, irrelevant and immaterial, the letters speak for themselves, and move to strike out that other portion of the testimony.

The Court: Motion denied.

Mr. Selover: I will offer Exhibit L, K, H, and the last clause of Exhibit I.

Mr. Choate: I object to the introduction of Exhibits H, I, L and K on the ground they do not

purport to be from the defendant to the plaintiff, incompetent, irrelevant and immaterial. 163

The Court: Objection overruled.

Mr. Choate: The objection is overruled as to all?

The Court: Yes.

Mr. Choate: Exception.

EXHIBIT L.

Courtenay, Nor. Dak
Nov. 8-1906.

Mr. Selover Bates & Co 164

Dear Sir I received yours of Recant Dat and will Say in Return that I was waiting to hear from you on your Return from Colorado and as Regard that Section of Mine I will say if you Can get me $5.00 per acer I wod Sell I want $5. Nett to Me and I will alow you to Sell it for me Providing you Make a sail of it before April First as I have hard very good Reports from that Part of the Country Hoping you May be able to Sell it before that Time as regards the Deed I Dont Care wheather I get the Deed or not before the Contract Ex- 165
pires as I have envested My Surplus More I have had I Sent My Enstalment to the Trust Company $127.90 (I wold Like to know Something a Bout the Taxes on that Section if you will Pleas Let Me know) Now in regard to thoes Letters that was sent to Me I will Enclose you One of them But Dont want to be implicated in any way But I think you Ought know with Best Wishes for your sucksess

I remain You Resp
P. D. Walsh.

166 EXHIBIT K.

The George H. Selover Company
Lands and Investments
509 Andrus Building

Minneapolis, Minn.,
Feb. 6, 1907.

Mr. P. D. Walsh,
Courtenay, N. D.

Dear Sir:—

I beg to report that I have sold your section 5-14-50 on the basis of our agreement between us, and enclose you herewith check for $100 paid by
167 the purchaser. The contracts have been made out and forwarded to them for execution and in the course of a short time will be back, with the balance of the first payment. Kindly acknowledge receipt.

Just as soon as the papers and the balance of the funds come back, I will immediately communicate with you and we will arrange the matter of the other payments.

Yours truly,
Geo. H. Selover.

168 G.H.S.-Enc.

EXHIBIT H.

Capital $100,000 Local and Long Distance
Surplus $51,800 Telephones.

Selover, Bates & Co.
INVESTMENT BANKERS
507-508-509 Andrus Building
Minneapolis, Minn., Nov. 7th, 1906.

Mr. P. D. Walsh,
Courtenay, N. D.

Dear Mr. Walsh:

169 I do not seem to be able to hear from you. I have looked up the matter of getting you your deed on section 5, and find it cannot be done at this time with anything that approaches convenience, and I am sure from the way we have gotten along together, that you do not expect us to anticipate payments merely as a matter of accommodation, for seven years.

If you want to sell that land, we can get you a good profit on it. I have an option on a section adjoining it at $4 and we could probably get you 170 that much anyway, perhaps $4.50. You will remember that we changed sections with you and gave you a very much better section than you had picked out at first, and we hope that you will feel that we are entitled to the opportunity to re-sell this for you whenever you want it sold, and in the writer's opinion, this winter is the time to sell that stuff.

Further, I would be personally obliged to you if you would send me either the originals or a copy of the letters which you said were written to you— 171 not that I want to involve you in anything, of course, but some little-minded sneak seems to be trying to do us injury, which, however, cannot result in any harm to us. But we would like to know what was in those letters and whether they were signed or not. Please let me hear from you.

Yours truly,

The Geo. H. Selover Company,

G.H.S. By Geo. H. Selover.

EXHIBIT I.

172 Capital $100,000 Local and Long Distance
Surplus $51,800 Telephones.

Selover, Bates & Co.
INVESTMENT BANKERS
507-508-509 Andrus Building
Minneapolis, Minn., Nov. 16, 1906.

Mr. P. D. Walsh,
Courtenay, N. D.

Dear Sir:—

Your option at $5 until April 1st is hereby ac-
173 cepted and I have no doubt whatever but that your section will be sold, as I have taken an option on Mr. Day's section and have control of the third section in the group and expect to sell them together.

Yours truly,
G.H.S-Enc. Geo. H. Selover.

Q. Was there any further correspondence than these letters upon this subject? A. Yes, sir, there was.

174 Q. Did your company ever receive this letter Exhibit Q which Mr. Walsh says he sent soon after receiving this remittance of $100? A. We certainly did not.

Q. What letter did you receive? A. At that time I received a letter from J. A. Coffey of Courtenay.

Q. Do you know who he is? A. I do now; I met him up there when I was up there taking depositions.

Q. Have you that letter? A. I have not.

Q. What has become of it? A. I don't know; I have been spending hours trying to find it since I came here and I can't find it. 175

Q. Is it lost? A. When it came it had the check with it. My best recollection is I put them in a separate envelope and marked them, as I have a way of doing with things that are important, and put it somewhere Since that our office has been changed two or three times when I was in California and I put some of the things in the Security warehouse, and I have looked for it and can't find it. 176

Q. What is your conclusion—is it lost or otherwise? A. Oh, it is lost.

Q. What was in that letter?

Mr. Choate: That is objected to as incompetent, irrelevant and immaterial.

(No ruling).

A. It was a short letter from Coffey; I won't undertake the words but I can tell you very easily what was in it. He said he had been instructed by Mr. Walsh to return the enclosed check which Mr. Walsh had received either that day or the day 177 before from us, and that he had been instructed by Mr. Walsh to tell us that the land had been withdrawn from the market, yours truly, or words to that effect.

Q. What do you understand to be an option, you use the word in your letter?

Mr. Selover: That is objected to as irrelevant, calling for a conclusion and a matter of law.

The Court: Objection overruled.

A. What is the question.

178 (Question read by the reporter)—to Mr. Bates? A. To Mr. Bates?

Q. To Mr. Walsh. A. Oh, I understand that there are several kinds of things that are called options. Where you own some land and give me a right to buy it at a certain time I call that an option. Where you own some land and give me a chance to sell it at a certain price I call that an option.

Q. You were an attorney at the time you wrote, that letter, weren't you? A. I was admitted to the
179 bar, it may not mean much.

Q. At that time did you mean when a man employed you as an agent to sell land for him that he employs you—when he gives it to you to sell it at a certain price net, you to sell it as his agent, that you were to get a commission, did you understand that was an option to you on the land? A. There is no such circumstances as that here.

Q. You are claiming in this case a commission, are you not? A. I am claiming as a commission what I sold or could sell the land for over and
180 above $5 net to him.

Q. Then when a man employs you as an agent to sell land for him at a net price do you claim that you can keep all above the net price? A. I can satisfy you as a matter of law on it—

Q. That is your understanding when you wrote him you had an option for that land, is that it?

A. That is a mere office name for it at the time; I accepted the proposition he made and tried to carry it out.

Mr. Selover: I wish to read from the deposition

of Ella T. Walsh taken in this proceeding; we offer this as cross examination under the statute, she being the plaintiff. The said 181

ELLA T. WALSH,

having been duly sworn, testified as follows:

Q. You are a resident of Courtenay, Mrs. Walsh? A. Yes, sir.

Q. For some years? A. About twenty years.

Q. You are the wife of one P. D. Walsh, a resident of Courtenay? A. Yes, sir.

Q. And you have been for more than five years?

A. Yes, sir, for nineteen years. 182

Mr. Selover: I will state that this deposition was taken on the 24th day of September, 1908.

Q. Is this the same P. D. Walsh that entered into a contract with Silas H. Bates, which is set forth in the complaint in this action? A. Yes, sir.

Q. Are you familiar with the terms of this contract? A. Why, not so very familiar.

Q. When did you first know of its having been entered into? A. Two years ago, or three.

Q. Could you give us any more accurate idea of the time? A. Do not know as I can. 183

Q. About two years ago now to the best of your recollection? A. Yes, sir.

Q. Did you have any information from Mr. Walsh before that time that he had bought some land in Colorado? A. Yes, sir.

Q. This contract was made the 26th of January, 1904, and that was about the time that you first heard of it? A. Yes, sir.

Q. Now, after that time do you know of any

184 arrangement that Mr. Walsh had with the defendant in regard to selling them the land at different times?

Mr. Choate: I wish to make an objection. This deposition it appears was taken in September, 1908, and commencing with the question just asked and including each question and answer from there to the question, "But whatever length of time the contract was given for you knew at the time?" the answer, "Yes, sir," on page 2nd, relate to an issue which was not then in the pleadings and to the
185 counterclaim which is set up and changed so as to be now quite a different counterclaim, that is, based on quite different facts as I understand it, first set up since the deposition was taken by an amendment and now modified again at the trial over objection of the plaintiff, and that the deposition taken under those circumstances cannot be competent at this time, taken when there was no such issue and upon the issues raised—

The Court: Couldn't they be used as admissions against the party?

186 Mr. Choate: I think a deposition taken under these circumstances before there was any such issue and upon issues made since and even at the time are not competent, and for that reason I object to this testimony that I have identified.

The Court: Objection overruled.

Mr. Choate: I make it for the further reason that the defendant's testimony already in shows they didn't attempt to or quit when they had to and therefore this is not relevant.

The Court: Objection overruled.

Mr. Choate: Exception.

187 Q. Now, after that time do you know of any arrangement that Mr. Walsh had with the defendant in regard to selling them the land at different times? A. Yes, sir; I understood that the same party wanted to secure the land and sell it over.

Q. And you understood that at different times that Mr. Walsh had made a price to them on the land? A. I do not know as he ever made any certain price.

Q. At least you understood that he had written them giving them some price upon the land? 188

Mr. Choate: We object to this testimony because it relates to conversations had with Mr. Walsh and the agreement entered into between this defendant and Mr. Walsh prior to the assignment to this plaintiff.

The Court: Objection overruled.

Mr. Choate: Exception.

A. Not any certain prices but that he would dispose of it.

Mr. Choate: May I have all of the objection I have made apply to each of these questions? 189

The Court: Very well.

Mr. Choate: The last part of my objection along these lines and an exception.

The Court: Yes.

Q. Then you have not any direct personal knowledge of Mr. Walsh having put a different price on it. Don't you remember that at one time, something like two years ago, that he put a price of $5 per acre on the land to the defendant? A. Really I do not remember in regard to price.

190 Q. There will be ultimately offered in this case a letter by Mr. Walsh to the defendant, dated some time in October or November, 1906, wherein he listed or optioned the land to the defendant until the April following at $5 per acre net to him. Now, the question is, did you understand anything of this, either by seeing the letter or from what Mr. Walsh told you? A. I do not remember what the price was.

Q. But whatever the price may have been you probably knew of it at the time? A. Yes, sir.

191 Q. And as to any of the other matters that the letter contained as to the length of time you probably knew of that at the time?

Q. You understand what I mean? A. Yes, sir; I knew that there were a certain number of months.

Q. But whatever length of time the contract was given for you knew at the time? A. Yes, sir.

Q. Do you claim, Mrs. Walsh, that you have any interest in this contract, marked Exhibit A and attached to the complaint? A. Yes, sir. I claim I have an interest of $3,000 or $4,000 of my

192 money he has received from me which he got to pay for this land, expenses and so forth pertaining to it.

Q. From what bank was some of this $600 drawn for this purpose? A. Stutsman County Bank.

Q. Is that here? A. Yes, sir.

Q. Was this drawn on your check? A. No it was not.

Q. How do you draw out whatever money you deposit in the bank? A. I do not draw it out my-

self; he drew it out himself by my permission.

193 Q. Whose name does the account stand in? A. Mr. Walsh's.

Q. Now Mrs. Walsh, when was the next money, if any, paid by you in any manner to Mr. Walsh in this connection? A. There was at different times but did not keep any particular account of it, but if I get right down to it I can figure out all the money he has drawn out for this land purpose.

Q. Was any money paid on this land from other sources than this bank account? A. Not to my knowledge.

194 Q. Now Mrs. Walsh, besides this $500, did you in any manner turn over to him anything in connection with this land, and when? A. No, I did not keep the dates in question.

Q. Give us the amount. A. It was somewhere near $3,000 at different times.

Q. And that money was for the purpose of investing in this land? A. Yes, sir, this was my intention at the time.

Q. For making payments and so forth? A. Yes, sir, for making payments and other expenses.

195 Q. Expenses made by trips made by Mr. Walsh to see the land? A. Yes, and other expenses.

Q. Now, Mrs. Walsh, when did your husband turn over to you this contract as security for money you advanced, if ever? A. Let me see, it was two years ago this winter when he turned over the contract.

Q. Can you state more definitely when this was? A. Do not just know without looking it up.

Q. What did he do with it? A. He presented

196 me with the contract issued by him and S. H. Bates.

Q. As far as you know what did he physically do about the papers? He gave me the contract as security for my land.

Q. Did he actually hand you the paper or contract at the time, or was it put away for you? A. I could not say.

Q. As far as you know it was in the bank and remained there afterwards? A. Yes, sir.

Q. You do not know whether it was the copy or
197 original that he left in the bank? A. I presume that it was the original.

Q. Can you tell me what date this was, or have you any memorandum? A. No, sir.

Q. Have you any memorandum or book whereby you can ascertain? A. No, sir.

Q. Have you ever since that day ever had the contract in your hands physically? A. No, sir.

Q. Had you ever had it before that time? A. No, sir.

Q. Have you told us all your remember in con-
198 nection with the turning over of this contract? A. That is about all.

Q. Was there any money paid over by you at the time of the turning over of the contract, and if so, how much and at what time? A. I cannot tell how much exactly was paid at that time.

Q. Then you gave him permission to draw out of this account which was partly your money? A. I gave him permission to take whatever he was in need of at the time.

Q. Do you know whether he made any payment

at this time? A. No, sir.

199 Q. The only occasion for any money at this time would be something called for by the contract? A. Yes, sir.

Q. Now Mrs. Walsh, I wish to ask you once more if you have any means of finding out by reference to any papers whatever the date when this contract was turned over in the manner you described? A. I do not know until I look it up.

Q. Could you find out presently? A. I think I can.

200 Q. Do you remember of having received a letter written by defendant to Mr. Walsh about the first week in February, 1907, and enclosing a check for $100 and stating among other things that the land had been sold under an agreement between Mr. Walsh and the defendant?

Mr. Choate: Same objection to that question and answer, and also to the bottom of that page 4.

The Court: Same ruling.

Mr. Choate: Exception.

A. No, sir.

201 Q. You do not remember anything about that letter or check being sent? Did you turn it over to Mr. Coffey while Mr. Walsh was away? A. Oh, yes, I left the business entirely to Mr. Coffey.

Q. Did you receive the letter I described and turn it over to Mr. Coffey? A. I cannot remember just how it was.

Q. You saw the letter? A. Yes, sir.

Q. Did you turn the letter over to Mr. Coffey?

A. No, sir.

Q. Who did? A. I don't know.

202 Q. Do you know what he answered? A. No, sir.

Q. You knew what he was instructed to do?

A. No, sir.

Q. You knew what he was instructed to do?

A. No, sir.

Q. Did you ask Mr. Walsh to instruct him?

A. Yes, sir.

Q. What instructions to give Mr. Coffey? A. I asked him to do the very best to his knowledge he could do, according to my knowledge of business which I know very little about.

203 Q. What arrangement was there at any time between yourself and Mr. Walsh as to how much interest he should pay you on this money? A. He never made any agreement.

Q. Did you expect he would eventually sell the land and return you your money? A. I was not particular about this.

Q. Then if he sold the land and returned you the money, that would be satisfactory to you? A. I don't know as I ever mentioned this.

Q. Well, what was your expectation?

204 Mr. Choate: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. I knew there were different ways he could pay this money.

Q. You mean that it did not make any particular difference where he got the money or when it was returned as long as it was secured? A. No, sir.

Q. Did you personally ever employ counsel in this action? A. No, sir.

Q. Did you ever communicate with Mr. Choate in connection with this action? A. No, sir. 205

Q. Did you ever direct anyone to bring this action? A. I talked to Mr. Walsh and gave him instructions to procure the land or its worth.

Q. You left that matter to him? A. Yes, sir.

Q. Did you ever personally notify the defendant that you claimed any interest in the land? A. No, sir.

Q. Do you know now what this action is brought for, of your own knowledge? A. Well, I understand it is to secure the land. 206

Q. You mean to secure the land and the title to it? A. Yes, sir, to get the land and title to it.

Q. That is what you understand the proceedings are for? A. Yes, sir.

Q. Do you know in whose name the action is brought? A. For Mrs. Walsh.

Q. At the time this contract was turned over in the manner you have described you knew that Mr. Walsh had given the land to the defendant to sell for a number of months, as you stated, and that that time had not expired? 207

Mr. Choate: Same objection to that question and all the rest on that page and the next page down to the question, "But if he did take such action it was at your request and he was authorized to do what he thought was for the best?"

The Court: Same ruling.

A. Yes; I understood he had talked the matter over but did not think there was any certain amount of time.

Q. You stated a while ago that there was a cer-

tain number of months? A. I won't be so sure about that.

Q. Assuming that Mr. Walsh's letter gives the defendant until April 1st to sell the land in, I ask you this question: when this matter was turned over as you testified you then knew that it was listed at the price stated with the defendant? A. I do not know the particulars about this to give you enough information.

Q. If that letter states April 1st and was written some time in October or November, then the difference in time would be the period during which you understood the defendant had the land to sell?

A. Yes, sir.

Q. Did you have any means at the time the contract was so turned over as to whether it had expired or not?

Mr. Selover: I presume it means in reference to whether it had expired or not.

A. No, sir.

Q. Did you pay any attention to whether it had expired or not? A. Not any particular attention myself, because I knew there were others that had.

Q. Did you at any time between November, 1906, and April, 1907, direct anybody to change the price at which this land might be sold by the defendant as far as you were concerned? A. Why, no, I did not.

Q. Whatever the arrangement was that Mr. Walsh made with the defendant for the selling of the land you had no objection to it at that time, had you?

Mr. Choate: I object to that as irrelevant and

immaterial.

The Court: Objection overruled. 211

Mr. Choate: Exception.

A. No, sir; I left that to his judgment.

Q. If it appears that such an arrangement was made with the defendant, whatever that arrangement was, you had no objection to the arrangement being made for that definite period, whatever it was? A. No; I do not think I remember of it.

Q. Why then was that $100 check returned as far as you were concerned if you had nothing to do with it? A. Why, I do not know, I did not pay 212 any attention.

Q. Did you really have anything to do with it?

A. No, sir.

Q. Did you instruct Mr. Coffey to return that check? A. I did not. I knew nothing of the arrangements of the check as I left it to others to do so.

Q. Did you authorize Mr. Coffey to notify the defendant? A. Yes, sir; I notified him to do the very best he could.

Q. Did you authorize Mr. Coffey to notify the 213 defendant that you would not carry out the sale when the $100 check was sent? A. Why, that was in the arrangement, that whatever was the best for my interest, he was to do whatever was square.

Q. Then you left it to Mr. Coffey? A. With these instructions to do what was in our interests.

Q. Well, you know now, do you not, Mrs. Walsh, that the defendant was notified by Mr. Coffey that the arrangement on which the defendant might sell the land was broken and that Mr.

214 Walsh would not accept the sale? A. Yes, sir.

Q. You know that, do you? A. Yes, sir.

Q. And that authority was given to him at the time this $100 check was sent back? A. Yes, sir, I suppose it was about that time.

Q. When you instructed Mr. Coffey to look after your interests, did you intend that he should refuse to carry out the arrangement on which the defendant had a right to sell the land for a definite time? A. Yes, sir, it was left to his judgment.

Q. And if he took such action so that he refused
215 to accept the sale that was made by the defendant within the time that was given it, you were satisfied that he should do so? A. Yes, sir.

Q. What was the substance of the agreement, if any, in regard to that contract between you and Mr. Walsh? A. The agreement was that when I turned over the money I was to have the land.

Q. You mean his interest in that contract? A. Yes, whatever his interest was in that contract.

Q. For the $3,000? A. For the $3,000.

Q. Now, did he agree at any time to return the
216 $3,000 in money to you, I mean did he at this time? A. No, he did not agree to return the money; I was supposed to have the land for the money.

Q. Now, from the time the contract was turned from him to you, what was the agreement between you and Mr. Walsh as to who owned the contract?

A. Well, I owned it myself.

Q. Was that agreement that you have just testified to in writing or just verbal talk? A. Well, it was verbal talk.

Q. Since your direct and before your cross ex-

amination you have been in consultation with your husband and counsel, have you not? A. Yes, slightly. 217

Q. Did such consultation have reference to what testimony you were to give on your cross examination? A. Why, not in particular.

Q. Did it have anything to do with the matters in respect to which Mr. Choate has questioned you?

A. Not in particular; it was, some.

Q. Then you did consult with them at that time concerning the matters you have just testified to on cross examination? A. Yes. 218

Q. In this whole matter then up to the time of the so-called settlement Mr. Walsh had been acting for you in so far as you had any interest in the matter? A. Yes, sir.

Q. Can you now tell us when this so-called turning over of the contract took place with reference to anything you remember? A. I cannot remember the date.

Q. Do you know of any paper from which you can get that date? A. I think I can, I am not positive of that. 219

Q. You left this entire matter to Mr. Walsh, and to attorney when it was necessary to have an attorney, did you not? A. He was supposed to manage it for my interest and had a perfect right.

Q. Then you claim you had a sort of an interest in this contract ever since the first money was furnished by you to Mr. Walsh, and you knew at that time that the contract was taken in his name or supposed it was? A. Well, it was supposed to be, yes.

220 Mr. Choate: I will read some questions and answers.

(Same witness as above).

Q. Was the money you let him have to draw interest? A. Yes, sir.

Q. Does he deposit money of his own in that account also? A. Yes.

Q. Is the account kept together? A. Yes, sir.

Q. Do you know how much of this $500 was taken out of this account, was it all or quite a little of it? A. I think the greater part of it.

221 Q. And you decided that the payment on the land was the payment called for by the contract? A. Yes, sir, I supposed it was.

Q. Then it was for no other purpose as you were not improving the land? A. No, sir.

Q. The only occasion for any money at this time would be something called for by the contract? A. Yes, sir.

Q. As a matter of fact you did not talk to him personally, did you (referring to Mr. Coffey)—Mr. Walsh gave the directions? A. Yes, sir, Mr. Walsh

222 gave the directions.

Q. Did you authorize Coffey to so carry the matter on so that he would repudiate the arrangement about the sale by the defendant? A. We were not satisfied with the plans the defendant had made for the sale of the land.

Q. You have stated that you had some knowledge of some arrangement which had been made between Mr. Walsh and the defendant under which the defendant was to sell the land for him sometime during that winter. A. I do not know the

particulars about it.

223 Q. Was it in regard to negotiations following their failure to live up to their agreement that you told Mr. Coffey to do what was square? A. Yes, sir. I understood that they were trying to take advantage and not doing what was right.

Q. For how long a time has Mr. Walsh attended to your business? A. I have never paid but little attention to my business matters of a.ay kind.

Defendant rests.

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224 Mr. Choate: The complaint alleges that the land March 5th, 1907, was of the value of nine dollars an acre; I wish to amend it was worth ten dollars,

Mr. Selover: We object to it at this time.

Mr. Choate: It isn't rebuttal; I simply ask that privilege.

The Court: I think I will allow the amendment.

Q. Mr. Selover, on February 6th, in what is market Exhibit K, you state that you had sold the land and drawn a check for $100. Had you made a contract to sell that land prior to that 225 date? A. Yes, the contract that was binding on me I had.

Q. At what time? A. It was first made the 5th, 6th or 7th along there, in January, a preliminary contract, and that was merged in the one offered the other day, February 5th.

Q. When did you make your first binding contract with Nichols and his associates? A. Do you mean the contract that bound both parties?

Q. Yes. A. Well, you had it here, it is dated

March 1st; I looked it up on my books but it wasn't
226 delivered until 7th, but we were bound from the first day in January under our agreement with them if they saw fit to take it.

Q. Do you mean to say that one party was bound and the other not? A. Unquestionably.

Q. There is no such option in evidence, is there?

A. I testified to it and you have the last option on the table there. As I remember you objected very strenuously to let it go in the record; it is there.

227 Q. Is that the option you referred to, the one that isn't put in evidence? A. Yes. As I have said already two or three times—

Q. That is all I asked you—the option you referred to which was made the early part of January is the option which was ruled out of evidence?

A. No, it is not; there was one of a similar nature. There were four sections in the transaction—

Q. Three I thought. A. Well, there were four —5, 7, 9 and 15. The preliminary or first option,
228 the January option, was to the effect that they could take Section 9 by a certain date in February if they saw fit, and if they took Section 9 they could take the other three within a further time. Then this option was the first one given. Then they took up the first one and received additional time within which they could buy the other three, then they took up the three and we delivered it.

Q. Were the terms of all those options in regard to payment, were the payments to be made at different times in the future, in each case were

the payments to be made at different times in the future, from time to time in the future? Answer it by "Yes" or "No." A. Well, part of them were, 229

Q. Not all? A. Oh, no.

Q. Not all to be paid from time to time in the future? A. No, but they paid us $3840 when they took up this option.

Q. That wasn't the full cash consideration of the full section? A. Well, they had already paid some before—

Q. Part of the payments were deferred, were they? A. Part of them were, yes. 230

RE-DIRECT EXAMINATION.

By Mr. Choate:

Q. Did they at any time agree to pay you upon one section cash so they could take a deed on the whole section? A. Not in the contract but as I testified the other day, it was said if it was.

P. D. WALSH,

recalled.

Examined by Mr. Choate:

Q. Mr. Walsh, I refer to Exhibit H, which is 231 in evidence, being a letter signed by George H. Selover to you, asking permission to sell your land, stating that he could get $4 perhaps anyway and perhaps $4.50; I will ask you at that time how many times had you been out there? A. Just once—

Mr. Selover: Just a moment. That is objected to as having been gone into and not rebuttal.

The Court: Objection sustained.

Q. Upon whom did you rely at that time for in-

formation as to the value of that land?

232 Mr. Selover: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Choate: Exception.

Q. Did you have any means of information at that time as to the value of the land except what you got from them?

Mr. Selover: Same objection.

The Court: Objection overruled.

A. No, sir.

233

CHARGE.

Gentlemen of the Jury:

It appears that Mr. P. D. Walsh, the husband of the plaintiff, made a contract with Mr. Bates to buy 640 acres of land, or a section, in Colorado; it is described as Section 5, I think, Township 14, Range 50, Cheyenne County. The contract is in evidence as Exhibit A. Payments were to be made in installments of certain amounts of the principal and interest at stated times. The purchaser also

234 agreed to pay the taxes to the proper collecting officer as the same became due.

The defendant corporation succeeded to the rights of Mr. Bates in the land and in the contract with Mr. Walsh, and the defendant corporation attempted to terminate and cancel the contract because the taxes for 1906 were not paid when due; and conceiving that it had so done sold the land to other parties in the spring of 1907, and denied that the contract with Mr. Walsh had any effect thereafter, and so notified him on March 5th, 1907.

But I instruct you that as a matter of law the contract was not terminated by the notice served upon Mr. Walsh, because it was not such a notice as the law requires, and you will therefore return a verdict for the plaintiff for the damages she has sustained if you find from a fair preponderance of the evidence that she has succeeded to Mr. Walsh's rights in the contract or is the owner thereof. 235

The burden is also on the plaintiff to show the damages she has sustained by the defendant's repudiation of the contract. Such damages will be the fair and reasonable cash market value of the land on March 5th, 1907, upon such title as was stipulated for in the contract, less the amount then unpaid thereon. That sum, that is the unpaid sum, I have computed at $630.85; $630.85 was due and unpaid on March 5th, 1907, and that includes the taxes of $13.96 for the year 1906 which it is admitted were paid by the defendant. If therefore you find that plaintiff has succeeded to Mr. Walsh's rights and is the owner of the contract Exhibit A, then her damages for the defendant's repudiation thereof will be the fair cash market value of the land under the terms of that contract, or more accurately by the cash market value of the contract on March 5th, 1907. Of course you will take into consideration, as I already stated to you, the unpaid amount thereon, $630.85, and also the effect if any, on such value the fact that under the terms of the contract a deed was to be delivered in the future and was to contain certain reservations and exceptions. To the sum so obtained you should add interest at 6 per cent per annum since March 5th, 236 237

1907.

238 The important fact then on plaintiff's cause of action is the market value on March 5th, 1907, of the land the defendant's assignor, Mr. Bates, agreed to convey and on the terms he agreed to convey the same to Mr. Walsh. I might state here to you that the defendant has admitted that the land at that time was worth $6.75 per acre. It appears that the land is located where perhaps actual settlers have not been numerous, and therefore the land deals may not have been numerous or of the
239 kind that will be accurate guides in cases of this character, hence there may be some difficulty for you in passing on the proposition as to what the value of it was on March 5th, 1907.

In determining the value of the land in a locality it is proper for the jury to consider the terms under which it is to be conveyed, that is, what kind of deed is to be received, what the land is adapted for, its soil, its water supply, its topography, the communication facilities, the extent to which the surrounding country is settled, the activity of the
240 market or number of sales or transactions, and the testimony of persons acquainted with the land and the market, or so-called experts, that is, witnesses who have been permitted to testify as to the price which in their opinion the land would have sold for on March 5th, 1907. In determining what weight you should give to the opinion of these experts, you will take into consideration the experience and knowledge which the testimony shows the expert has, also his fairness and reliability or lack thereof which he may display, also what the expert

takes into consideration in giving his opinion as, 241
for instance, the conditions under which the deed is to be executed or the terms of the deed as provided for in the contract. Of course you are not to determine the value of the land in a trade, but the fair cash market value on March 5th, 1907, of the land under the terms of the contract Exhibit A.

The defendant in its answer sets up a counterclaim or offset against plaintiff. It claims that in the fall of 1906 Mr. Walsh gave the defendant the agency to sell the land for $5 per acre net to him, 242
such agency to continue till April 1st, 1907. That thereafter and in the first part of February, 1907, the defendant claims that it sold the land for $6.75, and the purchaser paid $100 down and was ready and willing to enter into a contract with Mr. Walsh to purchase at that price. That Walsh then refused to sell and to defeat the defendant's right to recover pretended to sell the land to his wife and revoked the defendant's authority to sell the land. The defendant therefore claims the right to offset on plaintiff's claim the amount it would have been 243
entitled to have received as commission had the land been sold to the purchaser procured by the defendant. That is defendant's claim on its counterclaim or offset.

The contract in regard to the agency to sell the land is contained in the letters which passed between the parties. Under that contract, the defendant, if it could sell the land for Mr. Walsh before April 1st, 1907, for more than $5 per acre, would be entitled to retain for its services what-

244 ever price it could obtain above that sum, be that amount little or great, so long as the defendant acted in good faith and without misrepresentation or deception toward Mr. Walsh. In the correspondence between Mr. Walsh and the defendant in regard to selling this land nothing is said as to the terms of payment, and hence it means that the $5 net per acre was to be paid when the sale was made, at least all that would go to Mr. Walsh on an assignment of his interest in the contract would have to be paid in cash at the time the sale was to
245 be made or closed. And therefore, unless the defendant has been able to prove to you by a fair preponderance of the evidence that Nichols and his associates were ready, able and willing to buy and to pay all cash of the $5 per acre going to Mr. Walsh on a sale, defendant has not earned a commission from Mr. Walsh or anybody else. Hence, you will have to determine if said purchasers were ready, able and willing to pay anything above $5 per acre, then such excess would be the defendant's commission, provided in its doing as agent it
246 acted in good faith and withheld no information which was to the interest of Mr. Walsh to know in regard to the conditions and market value of the land when this agency was obtained. An agent in order to be entitled to compensation must always act in good faith and for the best interests of his principal. If you find that the defendant actually made a bona fide cash sale at more than $5 per acre of this section so that under these instructions defendant is entitled to claim the excess of the price over $5 per acre as commission, still

there remains the question whether that is a claim or debt that may be offset against the plaintiff's cause of action. The plaintiff did not employ the defendant personally to sell the land, it was done by Mr. Walsh, and although she may have bought the land of her husband with the knowledge that he had employed the defendant to sell it and that the employment had still some time to run when she bought, she would not be liable in this action to an offset for commissions on a sale made by the defendant subsequent to the time she became an owner of the land. And Mr. Walsh although he gave the defendant the right to sell the land till April 1st, 1907, he himself had the perfect right to sell the land before that time without incurring any liability to the defendant, provided the defendant had not found a purchaser and reported that to him before he made the sale. 247 248

Commissions for a sale as claimed in this action, if you find defendant is entitled thereto, may only be offset against the plaintiff's cause of action if you find from a preponderance of the evidence that the sale was made by defendant, that is, the purchaser found by the defendant, prior to the assignment of the contract by Mr. Walsh to Mrs. Walsh. 249

The plaintiff's contention is that she obtained an assignment of the land contract in January, 1907, I think she claims the 7th of January, and prior to the time that the defendant made the alleged sale to Nichols and associates. The defendant on the other hand claims that the assignment was not made till after it had made the sale or procured Nichols and associates to purchase and that they

were ready to purchase and that it had notified Mr. Walsh of that fact and sent $100 payment of the earnest money to him, and the defendant claims that then to defeat defendant's right to commission this assignment to plaintiff was made, that therefore it was not in good faith but simply to defraud the defendant of its commission, and that Mrs. Walsh merely holds the contract now for her husband.

A written assignment of this contract to plaintiff has been introduced in evidence. It appears that it was acknowledged on a different day from the date it bears, that is, from the date stated in the contract. Neither the signing nor the acknowledgment determines the time of the execution of a contract. A contract takes effect when delivered with the intention between the parties that it should close the transaction. It is not the date stated in the contract, not the date stated in the acknowledgment thereof which determines when a contract takes effect, it is when the contract is passed between the parties with the intention that that closes the transaction.

If the defendant has proven by a fair preponderance of the evidence that it procured a purchaser prior to April 1st, 1907, who was ready, able and willing to buy this land at a price of $5 per acre cash or more, that the plaintiff had not then received the assignment of Exhibit A from her husband, then for the excess of such price beyond $5 the defendant would be entitled to offset against plaintiff's claim for damages in this action, and for the difference between that sum and the sum

plaintiff may have established as her right the verdict should be rendered. 253

In determining whether the sale or assignment to plaintiff was made prior to the time the defendant claims to have produced a purchaser, or whether such assignment was made for the purpose of defrauding the defendant out of the commission, that it was made in bad faith and merely colorable so that Mr. Walsh is yet the real party to the suit, you should consider all the evidence in the case bearing on that proposition, the relation of husband and wife that existed between Mr. Walsh and 254
plaintiff, how he acted, whether for himself or his wife, the situation of the parties to this lawsuit at the time of the alleged assignment to plaintiff, the date of the assignment and the date of the acknowledgment, the probability or delivery before or after the date of the assignment, the statements or explanations in regard to the transaction made by the parties to the suit or their witnesses subsequent to the transaction.

The defendant also claims that plaintiff from the very start was the owner of the contract, Exhibit 255
A, and that it was taken in her husband's name for her, that she was the undisclosed principal in that contract, and that her husband was her authorized agent to make the agreement for her with the defendant to act as the agents in selling the land at $5 per acre net to her. If you find by a fair preponderance of the evidence that such is the case, and that the defendant is entitled to a commission in that it produced to plaintiff a purchaser ready, able and willing to buy the land prior to April 1st,

1907, on the terms it was authorized to do, as I
256 have already instructed you, then such commission should be deducted from the sum plaintiff may be entitled to recover on her cause of action.

Now, gentlemen, I think that covers all the legal points in the case. You are the sole and exclusive judges of the facts and as to who is telling the truth, either as to witnesses whose depositions have been read to you or as to witnesses who have taken the stand here and testified before you. You in considering their testimony and the weight to be
257 attached thereto should take into consideration the interest that the witnesses have in the result of the action, to see whether such interest will make their evidence less credible than if they had no interest at all. You should also consider the feeling that the witness has to either party to the action, whether such feeling influences his testimony and makes it less credible than if no feeling existed. All these matters are for you to determine. If you find that any witness has wilfully and knowingly testified falsely to any material fact in issue, then the jury is
258 at liberty to disregard the entire testimony of such witness except in so far as he may be corroborated by other credible evidence.

I think that is all that I need to state to you.

The Court: Except as I have given your requests I will mark them "Refused."

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District. 259

ELLA T. WALSH,
Plaintiff,

vs.

SELOVER, BATES & COMPANY, a corporation,
Defendant.

DEFENDANT'S REQUEST.

The defendant requests the court to charge the jury as follows: 260

First: To find a verdict for the defendant upon the matters set out in the amended complaint.

ARTHUR W. SELOVER,
Attorney for Defendant.

For the purpose of settling a case herein, with a view to effecting an appeal herein, and for no other purpose whatever, it is hereby stipulated and agreed by and between the parties hereto that the facts, evidence, agreements and admissions hereinbefore set forth together with and including Exhibits A and B attached to the complaint, may be considered and treated as all of the facts, evidence, agreements and admissions in said case and that the same may be settled and signed accordingly; it is however hereby expressly understood and agreed that if the court shall settle a case herein as above agreed upon, said case shall not control in any subsequent proceeding in this court, nor in any manner prejudice either party from relying upon and referring to the original and official stenographer's 261

notes on file as to what took place at said trial and
262 the evidence adduced thereat.

A. B. CHOATE,
Attorney for Plaintiff.
ARTHUR W. SELOVER,
Attorney for Defendant.

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

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263 ELLA T. WALSH,
Plaintiff,

vs.

SELOVER, BATES & COMPANY,
Defendant.

CERTIFICATE OF TRIAL JUDGE.

The undersigned judge of the above named Court, before whom the above entitled action was tried hereby certifies that the above and foregoing transcript, pages one to seventy-four, inclusive, together
264 with Exhibits "A" and "B" attached to the complaint contains all the evidence introduced at the trial of the above entitled action and contains all rulings, orders and proceedings of every kind and nature at or made at the trial of the above entitled action; and it is accordingly allowed and settled as and for a settled case herein.

Dated May 3, 1909.

By the Court:
ANDREW HOLT,
Judge thereof.

Filed May 3, 1909, A. E. Allen, clerk, by F. S. Cady, deputy. 265

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

ELLA T. WALSH,
Plaintiff,
vs.
SELOVER, BATES & COMPANY, a corporation,
Defendant.

266

VERDICT.

We, the jury in the above entitled action, find for the plaintiff and assess her damages in the sum of four thousand thirty and 09-100 dollars ($4030.09).

Dated January 11, 1909.

CHAS. E. PATTERSON,
Foreman.

Endorsed: No. 101263. District Court, Hennepin County. Ella T. Walsh vs. Selover, Bates & Company, a corporation. Verdict.

Filed Jan. 11, 1909. A. E. Allen, clerk, by B. B. Niezalwoski, deputy. 267

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

ELLA T. WALSH,
Plaintiff,
vs.
SELOVER, BATES & COMPANY, a corporation,
Defendant.

268 NOTICE OF MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT OR FOR A NEW TRIAL.

To the above named plaintiff and to A. B. Choate, Esqr., her attorney.

Please take notice that the above named defendant, at a term of the above named court to be held on Monday, the 3rd day of May, 1909, at 10 o'clock A. M., of that day or as soon thereafter as counsel may be heard, will make a motion for an order granting judgment in favor of the defendant herein
269 notwithstanding the verdict heretofore rendered herein, or in case the said motion be denied for a new trial of said action.

Said motion will be made on the settled case herein and on all the pleadings, files and records in the said action; and will be made on the grounds:

First: That the verdict is not justified by the evidence.

Second: That the verdict is contrary to law.

Third: Errors of law occurring at the trial and more specifically assigned as follows:
270 The court erred:

1. In denying defendant's motion at the close of the plaintiff's case to direct a verdict in favor of the defendant on the grounds stated in said motion.

2. In refusing to give to the jury at the close of the evidence defendant's first request that the jury be instructed to find a verdict for the defendant.

3. In giving the following instructions to the jury. "But I instruct you that as a matter of law the contract was not terminated by the notice serv-

ed upon Mr. Walsh, because it was not such a notice as the law requires, and you will therefore return a verdict for the plaintiff for the damages she has sustained if you find from a fair preponderance of the evidence that she has succeeded to Mr. Walsh's rights in the contract or is the owner thereof." 271

Respectfully,

ARTHUR W. SELOVER.

Attorney for Defendant.

Filed May 3, 1909. A. E. Allen, clerk, by F. S. Cady, deputy.

272

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. Fourth Judicial District.

ELLA T. WALSH,

Plaintiff,

vs.

SELOVER, BATES & COMPANY,

Defendant.

ORDER DENYING MOTION.

The above entitled matter came on regularly before the court on a motion of the defendant for judgment notwithstanding the verdict against it or for a new trial and was heard by the court on May 3rd, 1909. 273

Arthur W. Selover, Esq., appeared for the defendant in the support of the motion and A. B. Choate, Esq., appeared for the plaintiff in opposition thereto.

The court having fully considered the matter and being fully advised in the premises, it is hereby

Order, that the said motion be, and the same is
274 hereby in all respects denied.

Dated May 3rd, 1909.

By the Court,

ANDREW HOLT,

Judge of District Court.

Endorsed: State of Minnesota, County of Hennepin, District Court, Fourth Judicial District, Ella T. Walsh, plaintiff, vs. Selover, Bates & Company, defendant. Motion for judgment and order denying same. Service of the within notice by copy
275 is hereby admitted at Minneapolis, Minn., this 3rd day of May, 1909. A. B. Choate, attorney of plaintiff, Arthur W. Selover, attorney for defendant, Metropolitan Life Bldg., Minneapolis, Minn.

Filed May 3, 1909. A. E. Allen, clerk, by F. S. Cady, deputy.

STATE OF MINNESOTA, ss. DISTRICT COURT,

County of Hennepin. Fourth Judicial District.

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276 ELLA T. WALSH,

Plaintiff,

vs.

SELOVER, BATES & COMPANY, a corporation,

Defendant.

NOTICE OF APPEAL.

To A. B. Choate, Esq., attorney for the above named plaintiff, and to A. E. Allen, clerk of said District Court:

Please take notice, that the above named defendant appeals to the Supreme Court of the State of

Minnesota, from that certain order of the said District Court entered herein on the 3rd day of May, A. D. 1909, by terms of which the said District Court denied the motion theretofore made by the defendant for judgment notwithstanding the verdict therein or for a new trial and from the whole thereof. 277

Dated this 24th day of May, A. D. 1909.

ARTHUR W. SELOVER,

Attorney for Defendant.

Endorsed: 101263. District Court, 4th Judicial District, County of Hennepin, Ella T. Walsh, plaintiff, vs. Selover, Bates & Company (a corporation), defendant. Notice of appeal to Supreme Court. Filed May 27, 1909. A. E. Allen, clerk, by F. S. Cady, deputy. Arthur W. Selover, attorney for appellant. Due service of the within is hereby admitted this 24th day of May, 1909. A. B. Choate, Atty. for plaintiff. Service admitted this 27th day of May, 1909. A. E. Allen, clerk, by F. S. Cady, deputy. 278

97 District Court, Hennepin County.

District Court, Fourth Judicial District.

Clerk's Certificate.

STATE OF MINNESOTA,
County of Hennepin, ss:

I, A. E. Allen, clerk of the above named court, do hereby certify and return to the Supreme Court of the State of Minnesota, that I have compared the papers writing to which this certificate is attached with the original, Amended Complaint; Amended Answer; Reply to Amended Answer; Settled Case; Verdict; Notice of Motion for Judgment Notwithstanding the Verdict or for a New Trial; Order denying Motion, and Notice of Appeal to Supreme Court, in the action therein entitled, as the same appear of record and on file in said Clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis, in said County this 11th day of August, A. D. 1909.

[Seal District Court, Hennepin County.]

(Singed) A. E. ALLEN,
Clerk of District Court.
L. E. PETRI,
Deputy.

98 No. 16293. State of Minnesota, Supreme Court. Ella T. Walsh, Respondent, vs. Selover, Bates & Co., Appellant. Opinion and Syllabus. Filed November 18, 1909. C. A. Pidgeon, Clerk. October Term, A. D. 1909. Brown, J.

99 State of Minnesota, Supreme Court, October Term, A. D. 1909.

16293.

No. 103.

ELLA T. WALSH, Respondent,
v.
SELOVER, BATES & COMPANY, Appellant.

Syllabus.

1. Finnes v. Selover, Bates & Co., 102 Minn. 334, to the effect, in so far as concerns an action for damages for the breach of an executory contract, made and to be performed in this state, for the sale of

land in another state, that Chap. 223 Laws 1897, whereby it is provided that no contract for the sale of land shall be declared cancelled except upon thirty days' notice to the vendee, controls the right of the vendor to cancel the same, followed and applied.

Order affirmed.

100 State of Minnesota, Supreme Court, October Term, A. D. 1909.

16293.

No. 103.

ELLA T. WALSH, Respondent,
v.
SELOVER, BATES & COMPANY, Appellant.

Opinion.

Action to recover damages for the breach of an executory contract for the sale of land, in which plaintiff had a verdict, and defendant appealed from an order denying a new trial.

The facts are as follows: One Bates was the owner of the land which is situated in the state of Colorado, and on the 26th day of January, 1904, entered into an executory contract for the sale thereof to P. D. Walsh. The contract was in writing and provided, among other things, for the payment of the purchase price at the office of defendant herein, at Minneapolis, this state, in installments at stated times in the future, and also that Walsh should pay all taxes levied against the land at the time provided therefor by the laws of Colorado. Thereafter Bates duly assigned the contract and all his right and interest therein to defendant in this action, who thereupon assumed all obligations imposed upon Bates. Prior to the attempted cancellation of the contract, presently to be mentioned, Walsh
101 had paid upon the purchase price of the property something over $700. Subsequent to such payment Walsh duly assigned his interest in the contract to his wife, plaintiff herein. On March 5, 1907, claiming that default had been made by Walsh in the performance of the terms of the contract respecting the payment of certain taxes assessed against the land, and which fell due March 1, 1907, defendant, by written notice, cancelled the contract and declared the same at an end and refused further to be bound by it. Thereafter plaintiff brought this action for damages for the refusal of defendant to perform.

Several questions were presented to the court below by the pleadings and evidence, only two of which are brought to this court for review. All others were eliminated by stipulation of the parties. The questions agreed to be submitted by this stipulation are (1) does Chap. 223, Laws 1897, which provides that a vendor in a contract for the sale of land shall have no right to cancel, terminate, or declare a forfeiture of the contract except upon thirty days' writ-

ten notice to the vendee, apply to the contract in question, and (2) if it be so held, is the statute constitutional?

1. The question whether the statute applies to the contract is disposed of adversely to defendant's contention by the decision of this court in Finnes v. Selover, Bates & Co., 102 Minn. 334, where the precise situation was presented and passed upon. But counsel for defendant contend that the case at bar is distinguishable in its facts. We are unable to discover any substantial difference between the two cases. The only features in which they differ at all
102 are that in the case referred to all parties resided in Minnesota, the contract was entered into, reduced to writing and signed, in this state, whereas in the case at bar the vendee, Walsh, resided in the state of North Dakota, the vendor, Bates, in Minnesota, and Walsh in fact signed the contract at his residence in the state of North Dakota; and in the further fact that in the contract here involved the taxes agreed to be paid by Walsh were to be paid in Colorado where the land is located. While these differences exist, they are of no material consequence. The contract here involved was a Minnesota contract; all negotiations leading up to its formation were had in Minnesota, and all payments, except the taxes, were to be made at defendant's office in this state. The fact that the contract, after the terms thereof had been agreed upon in this state, was subsequently reduced to writing and mailed to Walsh at his residence in North Dakota and by him there signed and returned to Bates at Minneapolis, does not make it a North Dakota contract. As stated, all negotiations were had in this state at defendant's place of business, and the principal element in the performance thereof, namely, the payment of the purchase price of the land, was to take place in this state. The taxes were payable in Colorado, for they could not be paid elsewhere, and in no proper view does this provision of the contract indicate an intention that the whole agreement should be governed and controlled by the laws of that state. There is therefore no distinction, in point of substance, between this and the Finnes case.

103 2. There can be no serious question as to the constitutionality of the statute. It in effect prescribed a period of redemption in contracts of this character and was within the power and authority of the legislature. Defendant's principal contention on this branch of the case is not so much that the statute is unconstitutional as that it should not be construed to apply to contracts made in Minnesota for the sale of land in another state. There is force in this contention, but within the rule of the Finnes case, which a majority of the court do not feel disposed to reconsider, the action does not involve the title to the land, is purely personal, and the rights of the parties are controlled by the laws of this state. Under the decision in that case, defendant had no right arbitrarily to declare the contract at an end and refuse to perform it and is liable for such damages as its refusal caused plaintiff. Following the Finnes case, we have no alternative but to affirm the action of the court below.

Order affirmed.

BROWN, *J.*

104 103. 16293. State of Minnesota, Supreme Court, October Term, A. D. 1909. Ella T. Walsh, Respondent, v. Selover, Bates & Co., Appellant. Petition for Re-hearing. Arthur W. Selover, Attorney for Appellant, 923 Met. Life Bldg., Minneapolis, Minn. A. B. Choate, Attorney for Respondent, 710 Temple Court, Minneapolis, Minn. Filed Nov. 29, 1909. C. A. Pidgeon, Clerk.

105 State of Minnesota, Supreme Court, October Term, A. D. 1909.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, Appellant.

Petition for Rehearing.

The appellant, after a very careful consideration of the opinion filed on November 19 herein, feels constrained to ask for a re-hearing herein for the following reasons and upon the following grounds, to-wit:

1. That in deciding said case, this Court wholly overlooked and failed to consider and decide the claim and point made by the appellant on Page 24 of its brief herein, the same being as follows:

"(*b*) By Ch. 355 Laws of 1909, the Legislature has provided that these statutes shall not be so construed as to apply to con-
106 tracts covering lands in other states or foreign countries."

11. That the Court in deciding said case wholly misapprehended and overlooked and failed to decide the claims and points made by the appellant in its said brief on Page 32, as follows, to-wit:

"If such statutes are held to apply to Exhibit "A", then they are, as so construed, in violation of the Constitution of the State of Minnesota, Art. 1, Sec. 7, in that it deprives the appellant of its liberty and property without due process of law; also in that it deprives the appellant of its liberty and property without due process of law in violation of the Constitution of the United States, Art. XIV, Sec. 1, and in that, under both constitutions, it denies to the appellant the equal protection of the laws."

Argument.

I.

It should not require any more than the merest statement calling the Court's attention to its having overlooked and failed to decide the point made under Paragraph 1, and upon Page 24 in said brief, under the rules of this court in order to make it clear that appellant is entitled to a re-hearing upon that point and claim. The legislature has adopted a rule of construction, as applied to the statute in question, as claimed by the appellant, a rule directly the opposite

of the holding of the court on the question of the applica-
107 bility of the statute of 1897 to the facts in this case. If Chapter 355 of the Laws of 1909 is valid—and no one has questioned it in this court—then it either applies to the contract in question or it does not. The claim of the appellant is that it does so apply and that this court is bound by the construction placed upon this legislation by the Legislature itself. A Legislative act has small weight or effectiveness if this court does not even notice or consider the same; in such case it might as well never — been passed. And, the services of counsel to his client are still less effective, if when the Legislature has acted, he is unable to secure for such act the attention and consideration of the courts. Being satisfied that such was not the intention of the court and that this statute and its bearing on this case has been inadvertently overlooked by the court, counsel for this reason asks that a re-hearing be granted on this question.

II.

Except for the application of Chapter 355 of the Laws of 1909 to the contract in question, the appellant is bound to acquiesce in the decision of this court as to the applicability of Chapter 223 of the Laws of 1897 to the contract in this case. Whatever the intent of the legislature may have been, whatever appellant may have thought it was, this court has determined that the legislature did intend in passing that Act, to cover just such a situation as is here
108 presented. The statute is whatever this court says it is, and nothing else; therefore, the statute, as construed by the opinion just rendered in this case, is made to read as if there were added thereto in the original text of said Chapter 223, the following words:

"And this Act shall apply to and govern all contracts made by any vendor resident in this State by and with any vendee resident in another state for the sale of land owned by said vendor in a third state, where such contracts are made in this state and the purchase price of said land is to be paid therein."

We have, then, reached this situation,—that the above has been declared to be the law and to have always been the law and the intention of the legislature since the passage of said Chapter 223.

I have hesitated and do now hesitate to again bring this matter before this court. But I have decided to do so quite as much out of regard for my duty as a counsellor of this Court, and out of the high regard which I entertain for this Court, and for its traditions, as on account of any interest my client has in the outcome. And I have felt and do now feel that such duty to this court requires the utmost effort on my part to assist in arriving at the proper rule of law in this case and in preventing, as much as lies in my power, the unfortunate and in my mind stupendous consequences which will follow in the wake of the proposed decision.

On the bottom of Page 23 and in other places in our brief, the right of the legislature to pass such a law, in so far as it affects con-
tracts on lands within this state, is unquestioned and ad-
109 mitted by the appellant; and, as I construe the few sentences in the opinion referring to the constitutionality of this

statute, that is all that is decided, leaving wholly untouched the main, and indeed, the sole contention of the appellant.

I contended in the written brief, and upon the oral argument that it was the statutes as so construed by this court to cover and include this contract that was beyond the power of the state to enact; that when the legislature attempts to regulate the right of parties to terminate their contracts for the sale of lands in another state, contrary to their express contract, it goes beyond its territorial jurisdiction and authority; that when it assumes to take away from a citizen his admitted right to so contract respecting the termination of such a contract, without giving him any adequate or correlative right and remedy in its place, it takes from him his liberty and property without due process of law; and that when it attempts to prohibit the citizen of this state who has his lands in another state from agreeing as to such termination with his non-resident vendee, and gives to him an alleged remedy which is no remedy at all—a wholly impossible one—while at the same time the Act gives to all other citizens who sell Minnesota lands a plain, adequate, speedy and reasonable right and remedy in place of such prohibited one, it plainly denies to the first citizen the equal protection of the laws; indeed it takes away his common law right of contract, and gives him absolutely no protection at all, while adequately protecting the
110 other citizen who happens to be fortunate enough to own and sell lands in this state.

I do not intend to re-argue the matter in this application except to point out to the court, as it seems to me, wherein it has misapprehended our position and failed to decide the same. The statute is what the court says it is, whatever that may be; it has very plainly stated its construction thereof so as to include this and similar contracts. It is plainly a situation where this court is called upon for the first time to pass upon the validity of that statute, plus that construction, and I submit that it has not done so; and to do so adversely to the claim of the appellant would be to directly authorize the legislature to pass an act having for its sole purpose the regulation of what the court deems "the right of redemption" in respect to contracts for lands in another state or country, simply because the vendor happens to make the contract within this jurisdiction and the payment of the purchase price is to be made here. There are in the cities of St. Paul and Minneapolis scores of concerns who have put out during the past few years many thousands of such contracts covering lands in other states and foreign countries, and I for one do not believe for a moment that this court is going to decide that every contract of that sort with non-resident buyers must be foreclosed first in and in accordance with the laws of the state or country where the land is situated, or under the terms of the contract, and then again under the laws of this state. To require
111 the vendor to pursue dissimilar remedies in different jurisdictions would be a discrimination against him and in favor of the party with whom he is contracting which is opposed to the fundamental law.

But the proposed decision in this case goes infinitely further than

that just mentioned, in that it not only requires that the vendor make such two different and dissimilar foreclosures, but it wholly fails to point out any manner in which he can make any foreclosures whatever within this state; in other words, it prohibits him from causing the termination of his contract in any other manner than that prescribed by the statute and then ties him to a method and a manner which is utterly impossible. It says to such vendor that he shall not foreclose such a contract at all and that the so-called right of redemption shall never begin to run in his favor;—for in what possible manner can the vendor in such a contract as ours start the thirty-day statute running in his favor? In none whatever; and no one pretends that he can. Counsel on the other side makes no such pretension, and it is so manifestly impossible as to be not the subject of argument.

Now then, what is the exact situation brought about by the construction given this statute by this court? The citizen of Minnesota who sells his Minnesota lands to the Minnesota vendee is given a plain, adequate and reasonable remedy. His vendee is given a reasonable so-called period of redemption. Each one has one remedy and but one. But one course of action is required of the
112 vendor. The vendee has no unreasonable rights; he must either pay within the time or lose his equitable interest in the land, as he should. This is all simple, clear, plain and reasonable.

It may have seemed to the court in deciding the original Finnes case, that because Finnes was a resident of Minnesota at the time the notice was served on him, that it was possible for the vendor to get service upon him within this state, at the time of his breach of the contract and that the vendor could in that manner lay a foundation toward compliance with this statute.

But in the case at bar it is manifest that no such foundation can be laid:—and therein lies one distinction at least, between this and the Finnes case upon constitutional grounds. There might perhaps be in that case an opportunity to lay the foundation for a termination of the so-called "personal rights" of the vendee in accordance with this statute; but in this case there is no possibility of so doing.

But the moment you step across the border line and deal in land in a foreign state and with a non-resident vendee, you give to that vendee a double opportunity, in that he first may comply with the law of the contract, which is the law of the state where the land lies; or, if he fails to comply with that, you give him another right to come here at any time in the distant future and tender his money to the vendor and compel the vendor at such time to convey the property to him or to suffer the penalty sought to be enforced
113 in this case. Thus on the one hand the vendee is given a double right, a double opportunity; he may disregard the limitations placed in the contract by himself, he may disregard the limitations of the law of the place where the land is situated, and he may disregard and hold as naught any notice or proceeding given or taken in such foreign state, and then when he gets good and ready he can come in here and say: "I have not broken my

contract; that contract is still in force until you serve a certain notice in a certain manner, and I then have thirty days after that is done within which to comply; I know that yau cannot serve that notice in accordance with that statute and that you never will be able to serve such notice, and I will therefore take my time about tendering the money. My contract is still in force and until you set that thirty-day "statute of redemption" in motion I am under no obligation to make payment of principal, interest, taxes or do any other thing called for by my contract; and I will not do it, because the Minnesota Supreme Court has said I need not."

Now turn to the other side of the picture. The vendor may foreclose in accordance with the laws of the state where the land is, or under his contract, and it is held at naught. He cannot foreclose in this state at all under the terms of the statute, hence the only limitation there is upon his liability, under the holding of this court in these cases, is the statute of limitations itself; and such vendor, having foreclosed according to his contract and the law of the state where the land is, must sit idly by with his hands tied behind
114 his back awaiting entirely the pleasure of the vendee in the six years to come, bound to produce the title to the land the moment the vendee comes in and says he wants it, under the penalties sought to be enforced in this case.

Is that the rule which this court is going to lay down? Is that the equal protection of the laws guaranteed to all citizens of the states by the Constitution of the United States? Can double rights and double opportunities be given, by force of a statute and against the very words of the agreement of the parties, to one party and every vestige of rights taken away from the other?

To hold as is demanded here would utterly destroy the operations of scores of individuals and companies who had supposed hitherto that the opening up of vast tracts in the West and the bringing about of the settlement of the newer parts of the country was a commendable thing instead of being the reason for their being declared outlaws; and to deprive a citizen, in so far as this jurisdiction is concerned, of all right to terminate such a contract at any time, in any place and in any manner, so as to protect him against the vendee, is to declare him an outlaw and to put him beyond the pale of the law.

Such a decision as is proposed here would encourage every contract holder beyond the borders of the state, whose contracts during the past six years had been terminated according to its terms or the law of the state, territory or country wherein the same was
115 situa-ed where the contract was made and the purchase price to be paid here,—to make a tender at some time in the future when it has become impossible for the v-ndor to comply with his contract, and such tender being refused, compel the vendor to pay the full market value of the land at the time of such tender, be it two, five or twenty times as much as the original contract price. Under this doctrine no concern can tell today where it stands, or how many such contract holders, foreclosed according to their solemn agreement, may appear upon the scene tomorrow with a tender of

performance as above, in the one hand, and a copy of the proposed decision and a demand for judgment for the present value of the land in the other.

Such men seek counsel who examine the proposed decision and are forced to advise their clients that there is no defense known to the law which counsel can interpose to a complaint founded upon such a claim. For counsel to plead foreclosure according to the contract, the court has already decided to be of no effect; and it is impossible for him to plead compliance with the statute, because no matter how hard his client had attempted to comply therewith he could accomplish nothing in that direction; and he would have to submit to full damages, without any defense which could even be written out and put on paper. He is put up against an impossibility.

This court knows that upon the statute books of Minnesota is a law which permits the foreclosure of mortgages and which grants a certain period of redemption in connection therewith. It
116 also knows that millions are annually loaned upon lands in western states by corporations and individuals resident in this state, where the mortgages are made here and the notes they secure are payable here. The periods of redemption in those other states or foreign countries differ; many of them are for a shorter length of time than the year allowed in this state. If the doctrine contended for in this case is to *to* held by this court, it is equivalent to a holding that every one of such mortgages cannot be validly foreclosed in the state where the land is, or in accordance with the terms of said mortgages so far — the personal rights of the parties go, but that the period of redemption allowed by the laws of this state apply to such mortgage contracts and that unless and until the mortgagor forecloses the same directly in accordance with the laws of this state, by notice prescribed by our law and in the manner therein set forth, and allows the full year of redemption after such notice has been given—that such foreclosure in the foreign state is no protection to the mortgagee, and that the mortgagor may tender performance at any time within the statute of limitations and the resident mortgagee must accept such redemption money. Is this court prepared to hold that? And yet upon the theory that there are some personal rights of the parties involved, it would be much more reasonable to so hold than to hold what is demanded in this case, because a contract for the sale of land has to do only with the land itself and the rights of the parties in the land, whereas a mortgage upon land
117 has been repeatedly held by this court to be merely security for the debt and an incident following the contract evidenced by the note itself.

Such a holding would necessarily drive every mortgage loan concern and every dealer of land in other States out of the State of Minnesota, for no business could be conducted with the insecurity involved in this proposed decision; no business man could stand the strain involved in such decision, and no such concern would know for a minute what its assets and liabilities were at any time within the six-year statute of limitation.

But the appellant is in much worse position in this regard than an individual. Being a corporation organized under the laws of this state, it cannot get away from the effect of this statute as the individual could by simply going beyond the jurisdiction and carrying on its business elsewhere, because it is a corporation of this state. The only thing that it can do is to divest itself of its property and turn it over to some of its stockholders or an individual in another state, as trustee for its stockholders, and thus submit to what amounts in fact and in law to civil death.

There was a time some hundreds of years ago when it was thought constitutional and proper for the authorities of a walled city to prohibit its citizens from dealing in certain lines of merchandise and trade with the citizens of certain other and distant walled cities, under pain of death; but it is certainly a new doctrine at
118 this date that a citizen, simply and solely because he happens to own and wishes to sell lands in a foreign state, must submit to a similar penalty for selling his lands beyond the confines of this state, while the citizen who sells his lands within the state has the full and complete protection of the law.

A little while ago, over in the State of Wisconsin, they passed a law which provided that either party to a law suit, at any time before the trial, might examine, among other people, the former employés of a corporation, and neglected to provide that such party should have the right to similarly examine the former employé of an individual. The parties still have the right to take the deposition of any person residing more than thirty miles from the place of trial and still have the right to compel the attendance upon the trial of any person whatsoever within the jurisdiction; and yet the Supreme Court of Wisconsin, in Phipps v. Wisconsin Central Ry. Co., 133 Wis. 153, 113 N. W. Rep. 456, unhesitatingly held that the statute was void upon the ground that it denied to the corporation the equal protection of the laws. And if counsel for the respondent or this court is apt to minimize the importance of a correct decision in this case upon the ground that counsel for appellant takes too serious a view thereof, I have only to suggest that the rights invaded by the Wisconsin statute in question are infinitesimal as compared with those done away with by the proposed decision in this case.

For the above reasons, it appearing to me that the court
119 has overlooked and failed to decide the effect of Chapter 355 of the Laws of 1909 and has wholly misapprehended, overlooked and failed to decide the principal question argued and submitted in this case by the appellant—that such statute, as it has been held to be by this court, deprives this appellant of its liberty and property without due process of law and denies to it the equal protection of the laws—this appellant most respectfully requests that the court order a rehearing in this case.

ARTHUR W. SELOVER,
Attorney for the Appellant.

Addenda.

After the above was in print and could not be changed, a more careful reading of the first portion of the opinion herein disclosed to me that the Court had apparently overlooked one of the three principal points of distinction between the Finnes case and this, as to applicability, and I therefore feel constrained to add a third ground for the request for re-hearing, as follows:

III. That the court inadvertently overlooked and failed to decide the point made by appellant in his said brief herein, to the effect that the Finnes case is distinguishable in its facts from this case, for the following reason, to-wit:—that the vendee herein is shown by this record to have at all times been a resident of the State of North Dakota, and that by reason of such fact it was impossible —
120 the vendor to give the notice prescribed by Chapt. 223, or in any manner comply with the provisions thereof. A careful reading of the opinion discloses the fact that this important point has be-n overlooked in its entirety, as bearing upon the applicability of the statute and of the doctrine of the Finnes case. (See Brief page 20. (3), (4), (5) and pps. 20, 21, 22, 30, 40 and P. B. fol. 141-2.)

ARTHUR W. SELOVER,
Attorney for the Appellant.

121 No. 16293. State of Minnesota, Supreme Court. Ella T. Walsh, Respondent, *Appellant*, vs. Selover, Bates & Company, Appellant. Opinion and Order. Filed December 3, 1909. I. A. Caswell, Clerk. October Term, A. D. 1909. Per Curiam.

122 State of Minnesota, Supreme Court, October Term, A. D. 1909.
16293.

No. 103.

ELLA T. WALSH, Respondent,
v.
SELOVER, BATES & COMPANY, Appellant.

Per Curiam:

Counsel for defendant, both in the brief and on the oral argument of this cause, contended that if the statute referred to in the opinion be held to apply to the contract in question, it is, as so construed, in violation of Article 1 Section 7 of the state constitution and Art. 1 Sec. 14 of the constitution of the United States, and therefore void. This contention, following the Finnes case, was not sustained.

The rights of the parties here before the court accrued before the passage of Chap. 355, Laws 1909, and that statute has no application to the case.

Petition for re-hearing denied.

123 16293. State of Minnesota, Supreme Court. Ella T. Walsh, Respondent, vs. Selover, Bates & Company (a Corporation), Appellant. Petition for Writ of Error. Filed Jan. 11, 1910. I. A. Caswell, Clerk. Arthur W. Selover, Lawyer, 923 Metropolitan Life Building, Minneapolis, Minn.

124 State of Minnesota, Supreme Court.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, a Corporation, Appellant.

Petition by Appellant, Selover, Bates & Company, for Allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota.

To the Honorable Charles M. Start, Chief Justice of the Supreme Court *in* the State of Minnesota:

The petition of Selover, Bates & Company, appellant in the above entitled proceedings, respectfully shows that on the 8th day of January, 1910, a final judgment was entered in said Supreme Court, the same being a tribunal having jurisdiction under the laws of the State of Minnesota to render final judgment in said proceedings, wherein the petitioner was defendant and appellant, and the said Ella T. Walsh was plaintiff and respondent; and your petitioner further shows that in and by said proceedings the following facts appear, and in connection with the same the following claims were and are made by said petitioner:

125 I.

On the 3rd day of March, 1904, the assignor of the appellant, one S. H. Bates, entered into a contract, being Exhibit "A," attached to the complaint herein, whereby the said Bates agreed to sell unto one P. D. Walsh, Section Five (5) in Township Fourteen (14) South of Range Fifty (50), in the County of Cheyenne and State of Colorado, the said land being then owned by said Bates.

Said contract, Exhibit "A," contained among other provisions the following:

"In consideration whereof the said party of the second part has and does hereby covenant and agree to and with the party of the first part:

First. To pay him at the office of Selover, Bates & Company, at Minneapolis, Minnesota, as the remainder of the purchase price of said land, the gross sum of One Thousand Nine Dollars ($1009), with interest thereon, on the several dates and in the several amounts as follows:"

(Then follows the dates of the various payments, principal and interest.)

"Second. To pay, at the time when by the law the same becomes due and payable, to the proper collecting officer, all taxes and assess-

ments (special or general), which may be lawfully levied or assessed upon or against said lands (including any such taxes or assessments levied for or during the year 1904 or subsequent years).

* * * * * * *

Fourth. That time and punctuality are material and essential ingredients in this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise
126 to perform and complete all and each of the covenants and agreements aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall, at the option of said first party, become utterly null and void and all rights and interests hereby created, or then existing, in favor of the second party, or any one claiming under him, shall, at the option of said first party, utterly cease and determine, and the right of possession, and all equitable and legal interest in the premises hereby contracted, with all improvements and appurtenances, shall revert to and revest in said first party without any declaration of forfeiture or act of re-entry or any other act by said first party to be performed, and without any right of second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made. The said party of the first party shall have the right, immediately upon the failure on the part of the second party, to comply with the covenants and agreements herein written, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belonging. And the said party of the second part covenants and agrees that he will surrender unto the said party of the first part, the said land, improvements and appurtenances, without delay or hindrance, and no court shall relieve the party of the second part upon failure to comply strictly and literally with this contract."

The terms and conditions contained in Exhibit "A," attached to the complaint herein, were agreed upon between P. D. Walsh and the members of the firm of Selover, Bates & Company, at the
127 City of Minneapolis, Minnesota, in the office of Selover, Bates & Company, a partnership consisting of Chas. W. Bibb, Silas H. Bates, and George H. Selover, on the 26th day of January, 1904, and thereupon at said time and place said contract was drawn up, in duplicate, and left at Minneapolis, Minnesota, unsigned, with Selover, Bates & Company. Said contract, Exhibit "A," was agreed upon at that time for the purpose of selling to P. D. Walsh, Section Five (5) therein described, in place of Section Seven (7), Township Thirteen (13), Range Forty-six (46) in Cheyenne County, Colorado, theretofore sold to said Walsh. That said Walsh agreed to pay to said Selover, Bates & Company, as a difference in value between said two sections, the sum of Fifty Dollars ($50), which amount was to be paid before the delivery of Exhibit "A" and before the

substitution of Section Five (5) for said other section should take place.

That on the 29th day of February, 1904, pursuant to said agreement, said P. D. Walsh, at Courtenay, North Dakota, at the request of Selover, Bates & Company, sent by mail to said Selover, Bates & Company at Minneapolis, Minnesota, the sum of Fifty Dollars ($50) for the purpose of paying the consideration agreed upon for the exchange of said section.

That on the 3rd day of March, 1904, both copies of said Exhibit "A" were signed by said Bates at the City of Minneapolis, Minnesota, and mailed to said P. D. Walsh, at Courtenay, N. D.; that said Walsh received said instruments at said Courtenay, N. D., signed both of said contracts there, and returned by mail one copy thereof to said Selover, Bates & Company at Minneapolis, Minnesota, as appears by Exhibits 2, 3, 4 and 5.

Subsequently to the execution of said contract and before the commencement of this action, defendant corporation succeeded to all the rights and liabilities of said Bates, and said partnership,
128 under and pursuant to said contract.

That early in the year 1907 there became due and payable, and upon the 1st day of March thereof there remained unpaid and became delinquent, certain taxes which had been lawfully levied and assessed upon and against said land for the year 1906, and payable in Cheyenne County, Colorado.

The appellant elected to terminate said contract, according to its terms, on account of said breach thereof on the part of respondent's assignor, and served or caused to be served upon him in the State of North Dakota, wherein he resided, a notice in writing as follows, to-wit:

"Notice of Forfeiture of Land Contract.

To P. D. Walsh and any and all other persons holding or claiming to hold under him in respect to the land hereinafter described:

You and each of you are hereby notified that default has been made in the terms and conditions of that certain contract No. 97-A, by and between Silas H. Bates and P. D. Walsh, covering Section Five (5), Township Fourteen (14), Range Fifty (50), Cheyenne County, Colorado, which said contract has been heretofore duly assigned and set over unto Selover, Bates & Company, a corporation of the State of Minnesota, in this:

That the said P. D. Walsh and his assigns have wholly failed, neglected and refused to pay or cause to be paid at the time when by law the same became due and payable, to the proper collecting officer, the taxes and assessments, special or general, which were lawfully assessed and levied upon and against the said lands described in said contract, for the year Nineteen Hundred and Six (1906) or at all.

Now therefore, you and each of you are hereby notified that the undersigned has exercised the option given to said Bates and to it under the terms of said contract, to terminate the same upon the

said default, and that the same has been terminated on account of such default, and is null and void.

SELOVER, BATES & COMPANY,
By GEO. H. SELOVER, *Pres.;*
By A. E. BOWE, *Secretary.*

In presence of
L. SELOVER.

(Corporate Seal.)

(Verification by attorney.)"

129 That on the 8th day of April, 1907, the respondent, claiming that said notice was void and that said contract was in full force, made tender of the tax money so paid and the expense of serving said notice, which was refused.

That for many years before the execution of Exhibit "A" and continuously thereafter, both said Walsh and the respondent resided in the State of North Dakota and at no time in the State of Minnesota.

This action was then brought by the respondent, who had in the meantime succeeded to any rights that P. D. Walsh might have had, upon the theory that Chapter 223 of the laws of 1907, and the Acts amendatory thereof, applied to and controlled this contract; that such Acts required a written notice of thirty days to be given in and within the State of Minnesota, in a particular manner, before such contract would terminate, and it being conceded that no such notice had been given at the time tender was made, the contract was still in full force and the subsequent refusal of the appellant to perform was a breach thereof; that the notice actually given was in accordance with the terms of the contract and would, at common law, and in the absence of a controlling statute, terminate the contract and all interest of the vendee in and to the land described therein, but because of the fact that these Minnesota statutes controlled, and the notice called for by these statutes was the exclusive means of terminating such contracts, the notice as actually given on March 5th, 1907, as above, was nugatory and void. While there were other questions more or less discussed in the lower court, such have been eliminated by stipulation of the parties or the verdict of the jury, and it was stipulated before the Supreme Court of Minnesota that

130 the applicability of these statutes to the contract in question and the constitutionality of these statutes, if so applied, were the only questions for consideration in that court, and they were the only questions considered by the Supreme Court of Minnesota. And that court held, that the statutes aforesaid applied and were controlling and valid, under the doctrine announced in the case of Finnes v. Selover, Bates & Company, 102 Minnesota —, and against each and all of the claims of said appellant, as follows:

1. That the said statutes are inapplicable to the contract in question for the following separate reasons:

(*a*) That the contract in question was not made in Minnesota,

but in the State of North Dakota, where the said Walsh for the first time signed and assented to the conditions thereof.

(*b*) The vendee did not reside in the State of Minnesota and has never resided therein.

(*c*) That the land covered by said contract lies in the State of Colorado and not within the State of Minnesota.

(*d*) That the default on the part of the respondent was in respect to a matter which was to be and could only be performed elsewhere than in the State of Minnesota, to-wit, in Colorado.

(*e*) That it was impossible for the vendor to serve a notice within the State of Minnesota upon the vendee herein and it was equally impossible to obtain the return of the sheriff of the county, in Minnesota, in which the land lay, as such land was not within said state, and it was equally impossible to publish the notice in a paper printed and published in the county wherein said land lay, for the same reason; and that consequently no service could be made whatever under the statute, neither could the vendor in any manner
131 put itself in a position where it could take advantage of or receive any benefit from the provisions thereof.

(*f*) That these statutes were plainly intended to apply only to contracts respecting lands within the State of Minnesota and within the territorial jurisdiction of that State.

(*g*) That said intention was clearly shown by the supplementary Act of the Legislature, being Chapter 355 Laws of 1909.

2. And that if the above objections were overruled and said statutes construed so as to apply to and control the termination of all contracts of this nature, covering lands in other states or foreign countries, when made by a resident of Minnesota with a vendee continuously resident in a third state or country, then such statutes, as so construed, were repugnant to Section 1 of Article 14 of the Constitution of the United States, and therefore void.

The statutes in question are as follows:

Chapter 223, Laws 1897, reads as follows:

"SEC. 1. No owner of real estate or owner of any equity therein (who) shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future conveyance of any such real estate, or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, as hereinafter provided; and such notice shall be given to such vendee or purchaser, notwithstanding any provision or condition in any instrument to the contrary.

SEC. 2. Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same, he shall cause a written notice to be served upon the vendee or purchaser stating that such default has occurred, and that said contract will be canceled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty (30) days after the service of such notice.

SEC. 3. Such notice shall be served upon the vendee or
132 purchaser, or his assigns, in the same manner now provided for the services of summons in the district court of this state, if such person to be served resides in the county where the real estate covered by such contract, bond or other instrument, is situated. If such vendee or purchaser, or his assigns, as the case may be, is not within the county where such real estate is situated, then notice shall be served by publication in a weekly newspaper within said county; or, if there is no weekly newspaper within such county, then in a newspaper published at the capitol of this state, for a period of three (3) successive weeks.

SEC. 4. Such vendee or purchaser shall have thirty (30) days after service of such notice upon him, in which to perform the conditions or comply with the provisions upon which the default shall have occurred; and upon such performance and making of such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default has occurred therein. No provision in any contract for the purchase of land, or any interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding."

Section 3 was amended by Laws 1901, Chapter 294, so as to read as follows:

"SECTION 3. Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in the district court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state, or cannot be found therein, of which fact the return of the sheriff of the county in which such real estate is situated, that, such person to be served cannot be found in his county, shall be prima facie evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within such county, then in a newspaper published at the capitol of this state, for a period of three (3) successive weeks."

The above statutes were amended and re-enacted in the form of Section 4442 of the Revised Laws of Minnesota for the year 1905, as follows:

"4442. Notice to Terminate Contract of Sale.—When default is made in the conditions of any contract for the conveyance of real estate, or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser, his personal representatives or assigns, a notice specifying the conditions in which default has been made, and stating that such contract will terminate thirty (30) days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary, and shall be served in the same manner as a summons in the district court. If the person to be served is not a resident of the state, or cannot be

found therein, of which facts the return of the sheriff of the
133 county where the real estate lies that he cannot be found in such county shall be prima facie evidence, service may be made by three weeks' published notice. If within the time mentioned the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated, but otherwise shall terminate. A copy of the notice, with the proof of service thereof, and an affidavit of the vendor, his agent or attorney, showing that the purchaser has not complied with the terms of the notice, may be recorded with the register of deeds, and shall be prima facie evidence of the facts therein stated. ('97 c. 223; '01 c. 294.)"

The last amendment was by Laws 1909, Chapter 355, and is as follows:

"Provided that this act shall not be construed so as to apply to contracts for lands situated in another state or foreign country."

II.

By reason of the foregoing, any judgment or decree herein against defendant in the proceedings, and said statutes of the said State of Minnesota aforementioned, would be and are repugnant to the provisions of the Constitution of the United States and particularly to the provisions of Section One (1) of Article Fourteen (14), providing that

"Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And your petitioner further avers that the said final judgment and decision of the said Supreme Court of the State of Minnesota was and is against the said claims of this petitioner and against each of said claims; all of which said claims and decisions more fully appear by the records and files now remaining in said Supreme Court and also by the assignments of error herewith presented and filed with this petition.

134 Wherefore, Forasmuch as your petitioner believes that there were manifest errors in the said decision of said court against the several claims of this petitioner, as hereinbefore set forth, and in the final judgment in said proceedings, which is to the great damage of this petitioner, this petitioner prays that your Honor examine the records of said Supreme Court of Minnesota in that behalf and allow this petitioner a writ of error, to the end that said judgment and record may be brought before the Supreme Court of the United States, agreeably to the laws of the United States in that behalf enacted.

Dated January 8th, Nineteen Hundred and Ten.

SELOVER, BATES & COMPANY,
Petitioner,
By GEORGE H. SELOVER, *Pres't,* AND
ARTHUR W. SELOVER,
923 *Met. Life Bldg., Minneapolis, Minnesota;*
ROME G. BROWN,
1006 *Metropolitan Life Bldg., Minneapolis, Minn.,*
Its Attorneys.

Upon reading the above petition, upon said petition and upon the records submitted therewith I hereby allow the Writ of Error prayed for therein.

Dated January 11th, 1910.

CHAS. M. START,
Chief Justice, Supreme Court, State of Minnesota.

135 16293. Ella T. Walsh, Respondent, vs. Selover, Bates & Company, Appellant. Assignments of Error. Filed Sept. 20, 1909. C. A. Pidgeon, Clerk.

136 State of Minnesota, Supreme Court, October Term, A. D. 1909.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, Appellant.

Brief for the Appellant.

Assignments of Error.

1. The Court erred in denying defendant's motion at the close of the plaintiff's case to direct a verdict in favor of the defendant on the grounds stated in said motion.

11. In refusing to give to the jury at the close of the evidence defendant's first request that the jury be instructed to find a verdict for the defendant.

11-. In giving the following instruction to the jury: "But I instruct you that as matter of law the contract was not terminated by the notice served upon Mr. Walsh because it was not such a notice as the law requires, and you will therefore return a verdict for the plaintiff for the damages she has sustained, if you find from a fair preponderance of the evidence that she succeeded to Mr. Walsh's rights in the contract or is the owner thereof."

137 16293. State of Minnesota, Supreme Court. Ella T. Walsh, Respondent, vs. Selover, Bates & Company (a Corporation), Appellant. Assignments of Error. Filed Jan. 11, 1910, I. A. Caswell, Clerk. Arthur W. Selover, Lawyer, 923 Metropolitan Life Building, Minneapolis, Minn.

138 State of Minnesota, Supreme Court.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, a Corporation, Appellant.

Assignments of Error by Appellant, Selover, Bates & Company, Plaintiff in Error, Presented and Filed with the Petition for Writ of Error from United States Supreme Court — in the State of Minnesota.

The said petitioner, plaintiff in error, for writ of error from the Supreme Court of the United States to the Supreme Court in the State of Minnesota in the above entitled proceedings, by Rome G. Brown and Arthur W. Selover, its attorneys, at the same time with the presenting and filing of their petition for writ of error in the above entitled proceedings, state that in the record proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above entitled matter there are manifest errors, in this:

I. The said decision and judgment in substance and fact is a holding that Chapter 223 of the Laws of Minnesota for the year 1897, and the acts amendatory thereof, apply to and control the contract referred to in the complaint herein, as more particularly shown by the record; and

II. Such decision and judgment is in substance and fact one holding valid and enforcing the said statutes of the State of
139 Minnesota as against the claim of the plaintiff in error, as more particularly shown by the record. Which said statutes, as so construed to apply to the contract in question in this case, are repugnant to the Constitution of the United States in the following particulars:

(1) That the same deprive the plaintiff in error of its property without due process of law and are contrary to Section 1 of Article 14 of the Amendments to the Constitution of the United States.

(2) That the same deny the plaintiff in error the equal protection of the laws and are therefore contrary to Section 1 of Article 14 of the Amendments to the Constitution of the United States.

Wherefore, Said plaintiff in error prays that the said judgment of the Supreme Court of the State of Minnesota be reversed and annulled and that said plaintiff in error may be restored to all things that it has lost by reason of said judgment and that judgment be rendered in favor of said plaintiff in error and against defendant in error.

Dated January 8th, 1910.

ARTHUR W. SELOVER,
933 *Metropolitan Life Building, Minneapolis, Minnesota;*
ROME G. BROWN,
1006 *Met. Life Bdg., Minneapolis, Minn.,*
Attorneys for Plaintiff in Error, Selover, Bates & Company.

140 16293. Ella T. Walsh, respondent, vs. Selover, Bates & Co., appellant. Order granting supersedeas. Filed Jan. 12, 1910. I. A. Caswell, Clerk.

141 Supreme Court of the United States.

SELOVER, BATES & COMPANY, a Corporation, Plaintiff in Error,
vs.
ELLA T. WALSH, Defendant in Error.

The said Plaintiff in Error having this day filed in the Office of the Clerk of the Supreme Court in the State of Minnesota, in the above entitled cause a bond in the sum of Six thousand Dollars ($6000), and such bond having been duly approved this day by the undersigned Chief Justice of the Supreme Court in the State of Minnesota,

It is therefore ordered that all proceedings on the final judgment heretofore entered herein in favor of the Defendant in Error and against said Plaintiff in Error being in the sum of Four thousand three hundred and forty-eight Dollars, ($4348) and of date the 8th day of January 1910 be and the same are hereby stayed until the final determination of this cause in the Appellate Court.

January 11, 1910.

CHAS. M. START,
Chief Justice Supreme Court in the State of Minnesota.

142 16293. State of Minnesota, Supreme Court. Ella T. Walsh, respondent, vs. Selover, Bates & Company (a corporation), appellant. Bond on writ of error. Filed Jan. 12, 1910. I. A. Caswell, Clerk. Arthur W. Selover, Lawyer, 923 Metropolitan Life Building, Minneaoplis, Minn.

143 State of Minnesota, Supreme Court.

ELLA T. WALSH, Respondent,
vs.
SELOVER, BATES & COMPANY, a Corporation, Appellant.

Bond on Writ of Error.

Know all men by these Presents, That we, Selover, Bates & Company, a corporation of the State of Minnesota, as principal, and National Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, are firmly bound unto Ella T. Walsh in the full and just sum of Six Thousand Dollars ($6000), to be paid to said Ella T. Walsh, her heirs, executors or assigns, to which payment well and truly to be made the said principal binds itself, its successors and assigns, and the said surety

binds itself, its successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of January, in the year of our Lord, One Thousand Nine Hundred and Ten (1910).

Whereas, Lately, in the Supreme Court of the State of
144 Minnesota, in a suit pending in said court between the said Ella T. Walsh, respondent, and Selover, Bates & Company, appellant, judgment was rendered against said appellant, Selover, Bates & Company, on the 8th day of January, 1910, for the sum of Four Thousand Three Hundred Forty-eight Dollars ($4,348), and the appellant having obtained a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse the judgment in the aforesaid cause, and a citation directed to the said Ella T. Walsh, citing and admonishing her to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty (30) days after the date thereof:

Now the condition of the above obligation is such, That if the said Selover, Bates & Company shall prosecute said writ of error to effect and answer all damages and costs, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[CORPORATE SEAL.] SELOVER, BATES & COMPANY,
By GEORGE H. SELOVER,
Its President.
NATIONAL SURETY COMPANY,
By H. E. BERREAN, *Attorney-in-Fact.*

Executed in the presence of:

ARTHUR W. SELOVER.
ROSALIE C. LARSON.

145 STATE OF MINNESOTA,
County of Hennepin:

On this 8th day of Jan. A. D. 1910, before me appeared H. E. Berrean, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said H. E. Berrean acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] (Signed) F. C. BEURLEN,
Notary Public, Hennepin County, Minnesota.

My commission expires Feb. 23, 1911.

146 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 8th day of January, 1910, before me personally appeared George H. Selover, who being first duly sworn did say that he is the President of Selover, Bates & Company, the corporation which executed the foregoing instrument; that the seal attached thereto is the seal of such corporation; that the same was thereto attached and said instrument executed by order of the Board of Directors of said corporation, and that he signed said instrument by like authority; and the said George H. Selover acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] ARTHUR W. SELOVER,
Notary Public, Hennepin County, Minnesota.

My commission expires December 15th, 1913.

The foregoing bond is hereby approved.

CHAS. M. START,
Chief Justice Supreme Court, State of Minnesota.

147 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because, in the record and the proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of said state in which a decision could be had in the said suit between Ella T. Walsh, plaintiff and respondent in the said Supreme Court of Minnesota, and Selover, Bates & Company, a corporation, defendant and appellant in said Supreme Court, wherein was drawn in question the validity of a Statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened to the great damage of the said Selover, Bates & Company, as by complaint appears;

We being willing that the error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of October 1910, next; that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 12th day of January
148 in the Year of our Lord One Thousand Nine hundred and ten.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the United States Circuit Court
for the District of Minnesota,
By LOUISE B. TROTT, *Deputy.*

Allowed by:

CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

149 [Endorsed:] 16293. Supreme Court of the United States. Ella T. Walsh, Defendant in Error, vs. Selover, Bates & Company, a Corporation, Plaintiff in Error. Writ of Error. Filed Jan. 12, 1910. I. A. Caswell, Clerk. Arthur W. Selover, Lawyer, 923 Metropolitan Life Building, Minneapolis, Minn.

150 Supreme Court of the United States.

ELLA T. WALSH, Defendant in Error,
vs.
SELOVER, BATES & COMPANY, a Corporation, Plaintiff in Error.

Citation.

The Supreme Court of the United States to Ella T. Walsh, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington on the 10th day of October 1910, next, pursuant to a writ of error filed with the Clerk of the Supreme Court of the State of Minnesota, wherein the Selover, Bates & Company, a corporation, is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment rendered against plaintiff in error as in said writ of error set forth should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of January in the Year of our Lord One Thousand Nine Hundred and ten.

CHAS. M. START,
Chief Justice Supreme Court of Minnesota.

Due service of the within Citation is hereby admitted this 13th day of January 1910.

A. B. CHOATE,
Attorney for Defendant in Error.

151 [Endorsed:] 16293. Supreme Court of the United States. Ella T. Walsh, Defendant in Error, vs. Selover, Bates & Company, a Corporation, Plaintiff in Error. Citation. Filed Jan. 13, 1910. I. A. Caswell, Clerk. Arthur W. Selover, Lawyer, 923 Metropolitan Life Building, Minneapolis. Minn.

Endorsed on cover: File No. 22,078. Minnesota Supreme Court. Term No. 238. Selover, Bates & Company, plaintiff in error, vs. Ella T. Walsh. Filed March 28th, 1910. File No. 22,078.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 22.

SELOVER, BATES & COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

ELLA T. WALSH, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief for Plaintiff in Error

ARTHUR W. SELOVER,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 238

SELOVER, BATES & COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

ELLA T. WALSH, DEFENDANT IN ERROR.

Brief for Plaintiff in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF FACTS.

On January 26, 1903 one Silas H. Bates a resident of Minnesota and the owner of a certain tract of land located in the State of Colorado made and entered into with one P. D. Walsh a resident of North Dakota, a certain contract which is Exhibit "A" attached to the complaint herein. (Transcript F. 21.)

This contract was executed by Bates in Minnesota, was delivered to said Walsh in North Dakota and executed by him there. Walsh never subsequently lived in Minnesota.

Thereafter the plaintiff in error a corporation of the State of Minnesota became the assignee of said Bates and stands in his shoes.

The land which was the subject of the contract was situated in Colorado and the agreement which the plaintiff in error is held by the Court below to have breached was

"to make and deliver upon the surrender of this agreement by the said party of the second part, a good and sufficient deed, with ordinary convenants of warranty, conveying to said party of the second part, in fee simple, the following described real estate, to-wit:

Section No. five (5), of township No. (14), S. of range No. (50), West of the Sixth Principal Meridian, cantaining according to the United States survey Six Hundred Forty (640) acres, be the same more of less, situated in the county of Cheyenne, in the state of Colorado." (Transcript F. 22.)

The contract further provided for payment of the balance of the purchase price in installments to be made at Minneapolis, in the State of Minnesota, and the vendee agrees

"Second. To pay, at the time when by the law the same becomes due and payable, to the proper collecting officer, all taxes and assessments (special or general), which may be lawfully levied or assessed upon or against said lands, (including any such taxes or assessments levied for or during the year 1903 or subsequent years)." (Transcript F. 28.)

"Fourth. That time and punctuality are material and essential ingredients in this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the convenants and agreements aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall, at the option of said first party, become utterly null and void

and all rights and interests hereby created, or then existing, in favor of the second party, or any one claiming under him, shall at the option of said first party, utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted, with all improvements and appurtenances, shall revert to and revest in, said first party without any declaration of forfeiture or act of re-entry or any other act by said first party to be performed and without any right to second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made. The said party of the first part shall have the right, immediately upon the failure on the part of the second party to comply with the covenants and agreements herein written, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belonging. And the said party of the second part covenants and agrees that he will surrender unto the said party of the first part, the said land, improvements and appurtenances, without delay or hindrance, and no court shall relieve the party of the second part upon failure to comply strictly and literally with this contract." (Transcript F. 28-9.)

It further appears from the record that certain taxes duly levied against said land for the year 1906 became due on January 1, 1907 and delinquent on March 1, 1907, and were not paid and that for this default on the part of the vendee, the plaintiff in error elected to terminate the said contract in accordance with the terms thereof, and gave notice of the fact of such election to the said Walsh in writing in the State of North Dakota, (Transcript F. 11-33.)

Subsequently the plaintiff in error sold the land to other parties. (Transcript F. 17-58.)

Thereafter the defendant in error, claiming to have received an assignment of the rights of said P. D. Walsh in the contract in question, made tender of the amount of said taxes and the costs of serving the Notice, which tender was refused. (Transcript F. 12.)

This action was then commenced by defendant in error setting forth all the above facts, including an admission of the default on the part of her assignor, upon the theory that the Notice of Forfeiture given, although strictly in compliance with the contract itself, with the common law and the law of Colorado, was yet nugatory and void because not in compliance with a certain statute in force in the State of Minnesota at the time the contract was made. The Statute in question is as follows:

Chapter 223, Laws 1897, reads:

> Sec. 1. No owner of real estate or owner of any equity therein (who) shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future conveyance of any such real estate, or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, as hereinunder provided; and such notice shall be given to such vendee or purchaser, notwithstanding any provision or condition in any instrument to the contrary.
>
> Sec. 2. Whenever any default shall have been made in the terms or conditions of any such instrument hereafter made, and the owner or vendor shall desire to cancel or terminate the same, he shall cause a written notice to be served upon the vendee or purchaser stating that such default has occurred, and that said contract will be canceled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty (30) days after the service of such notice.

Sec. 3. Such notice shall be served upon the vendee or purchaser, or his assigns, in the same manner now provided for the service of summons in the district court of this state, if such person to be served resides in the county where the real estate covered by such contract, bond of other instrument, is situated. If such vendee or purchaser, or his assigns, as the case may be, is not within the county where such real estate is situated, then notice shall be served by publication in a weekly newspaper within said county; or, if there is no weekly newspaper within such county, then in a newspaper published at the capital of this state, for a period of three (3) successive weeks.

Sec. 4. Such vendee or purchaser shall have thirty (30) days after service of such notice upon him, in which to perform the conditions or comply with the provisions upon which the default shall have occured; and upon such performance and making of such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default has occurred therein. No provision in any contract for the purchase of land, or any interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, ~~and provision in such contract shall terminate until such notice is given, and~~ provision in such contract to the contrary notwithstanding."

Section 3, was amended by Laws 1901, Chapter 294, so as to read as follows:

"Section 3. Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in district court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state, or cannot be found therein, of which fact the return of the sheriff of the county in which such real estate is situated, that such person to be served cannot be found in his county, shall be prima facia evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within such county, then in a newspaper published at the capitol of this state, for a period of three (3) successive weeks." (Transcript 131-2.)

Chapter 223 of the laws of 1897 above set forth was expressly repealed by Section 5542 of the General Laws of 1905 and Chapter

294 of the laws of 1901 was expressly repealed by Section 5544 of the General Laws of 1905.

Upon the trial in the District Court, the plaintiff in error moved for an instructed verdict in its favor at the close of the case presented by the defendant in error, claiming the protection of the Constitution of the United States (Transcript F. 156) and also at the close of all the testimony. (Transcript F. 260). These Motions were by the Court denied.

The defendant in error requested a verdict in its favor and in compliance with such request the Court instructed the jury as follows: (Transcript F. 234).

> "The defendant corporation succeeded to the rights of Mr. Bates in the land and in the contract with Mr. Walsh, and the defendant corporation attempted to terminate and cancel the contract because the taxes for 1906 were not paid when due; and conceiving that it had so done sold the land to other parties in the spring of 1907, and denied that the contract with Mr. Walsh had any effect thereafter, and so notified him on March 5th. 1907.
>
> But I instruct you that as a matter of law the contract was not terminated by the notice served upon Mr. Walsh, because it was not such a notice as the law requires, and you will therefore return a verdict for the plaintiff for the damages she has sustained if you find from a fair preponderance of the evidence that she has succeeded to Mr. Walsh's rights in the contract or is the owner thereof."

The jury thereupon returned a verdict in favor of the defendant in error for the sum of $4030.00.

A motion for judgment notwithstanding the verdict or for a new trial having been denied (Transcript F. 273) and appeal taken to the Supreme Court of Minnesota (Transcript F. 276) the order of the Court below was affirmed in an opinion reported in 109 Minnesota 136, in part as follows:

"Several questions were presented to the court below by the pleadings and evidence, only two of which are brought to this court for review. All others were eliminated by stipulation of the parties.

The questions agreed to be submitted by this stipulation are (1) does Chap. 223, Laws 1897, which provides that a vendor in a contract for the sale of land shall have no right to cancel, terminate, or declare a forfeiture of the contract except upon thirty days' written notice to the vendee, apply to the contract in question, and (2) if it be so held, is the statute consitutional?

"1. The question whether the statute applies to the contract is disposed of adversely to defendant's contention by the decision of this court in Finnes vs. Selover Bates & Co., 102 Minn. 334, where the precise situation was presented and passed upon. But counsel for defendant contend that the case at bar is distinguishable in its facts. We are unable to discover any substantial difference between the two cases. The only features in which they differ at all are that in the case referred to all parties resided in Minnesota, the contract was entered into, reduced to writing and signed, in this state, whereas in the case at bar the vendee, Walsh, resided in the state of North Dakota, the vendor, Bates, in Minnesota, and Walsh in fact signed the contract at his residence in the State of North Dokota; and in the further fact that in the contract here involved the taxes agreed to be paid by Walsh were to be paid in Colorado where the land is located. While these differences exist, they are of no material consequence. The contract here involved was a Minnesota contract; all negotiations leading up to its formation were had in Minnesota, and all payments, except the taxes, were to be made at defendant's office in this state. The fact that the contract, after the terms thereof had been agreed upon in this state, was sub-

sequently reduced to writing and mailed to Walsh at his residence in North Dakota and by him there signed and returned to Bates at Minneapolis, does not make it a North Dakota contract. As stated, all negotiations were had in this state at defendant's place of business, and the principal element in the performance thereof, namely, the payment of the purchase price of the land, was to take place in this state. The taxes were payable in Colorado, for they could not be paid elsewhere, and in no proper view does this provision of the contract indicate an intention that the whole agreement should be governed and controlled by the laws of that state. There is therefore no distinction, in point of substance, between this and the Finnes case.

"There can be no serious question as to the constitutionality of the statute. It in effect prescribed a period of redemption in contracts of this character and was within the power and authority of the legislature. Defendant's principal contention on this branch of the case is not so much that the statute is unconstitutional as that it should not be construed to apply to contracts made in Minnesota for the sale of land in another state. There is force in this contention, but within the rule of the Finnes case, which a majority of the court do not feel disposed to reconsider, the action does not involve the title to the land, is purely personal, and the rights of the parties are controlled by the laws of this state. Under the decision in that case, defendant had no right arbitrarily to declare the contract at an end and refuse to perform it and is liable for such damages as its refusal caused plaintiff. Following the Finnes case, we have no alternative but to affirm the action of the court below."

A petition for re-hearing having been filed, the Court thereafter delivered the following opinion, per curiam:

"Counsel for defendant, both in the brief and on the oral argument of this cause, contended that if the statute referred to in the opinion be held to apply to the contract in question, it is, as so construed, in violation of Article 1, Section 7 of the state constitution and Art. 1, Sec. 14, of the constitution of the United States, and therefore void. This contention, following the Finnes case, was not sustained. The rights of the parties here before the court accrued before the passage of Chap. 355, Laws 1909, and that statute has no application to the case. Petition for re-hearing denied."

Final judgment was thereupon entered in the Supreme Court of Minnesota in favor of the defendant in error without remittiur, in accordance with the stipulation of the parties and the order of the Court; whereupon the cause was brought here upon a writ of error.

The first case in which the Supreme Court of Minnesota held these statutes to apply to and govern contracts for the sale of land situated in other States was **Finnes vs. Selover Bates & Co. 102 Minn.** 334, the opinion therein filed being as follows:

"Demurrer to the complaint in an action brought to recover damages for failure on the part of the appellant to carry the provisions of two certain contracts for the sale of real estate.

"The contract which is the basis of the first cause of action provided that the purchaser should pay for the real estate in annual installments and contained a provision that the contract should become null and void upon failure of the purchaser to make payments as in the contract provided, time being of the essence of the contract.

"The other contract, the subject of the second cause of action, contained the provision that upon failure of the purchaser to make the payments as provided by contract, then the contract should, at the option of the seller, become null and void.

"The complaint alleges: that although there was some delay in making the payments as required by the contract, appellant waived the same and that the purchaser made due tender of the amounts due before his rights under the terms of the contract were forfeited by any action taken on the part of the appellant. So far as the complaint discloses, the only step which appellant took to declare a forfeiture of the rights of the purchaser were, first: a letter addressed to the purchaser in the following language

"Please send your September payments on both contracts of Colorado land to the Minnesota Loan & Trust Company by return mail with 7 per cent interest on the amount from the date it fell due until the date you send it. Please do this at once in order to keep your contracts in good standing. Also write by same mail stating that you have done so."

"Second: the payment not having been made, 13 days later appellant served upon the purchaser a notice of forfeiture of both contracts. Appellant demurred to the complaint tn the ground that it did not state facts sufficient to constitute a cause of action.

"On the argument, the discussion took wide scope and covered the sufficiency of the complaint to state a waiver of the time fixed for payment, and if the statutory notice was not required, whether the notice served was sufficient to declare the contracts forfeited. It appears from the complaint that the notice above referred to was not such as is required by Sec. 223, Laws 1897 in effect at the time the contracts were executed. The provisions of that Act provide that a contract for the purchase of real estate could not be cancelled except upon notice by the seller in accordance with the statute. This statute applies to all contracts of purchaser, but not to mere options. Joslyn vs. Schwend, 85 Minn., 130.

"The contracts under consideration were bound by the terms thereof and the provision in the first contract to the effect that it should become void upon failure of the purchaser to make the payments as required, did not have the effect to remove the contracts from the operation of the statute; and hence, statutory notice was require before the forfeiture could be declared.

"Although the land in question was situated in the state of Colorado, the contract was executed in this state and appellant was a corporation duly created and existing under and by virtue of the laws of this state, was located and transacted business in the city of Minneapolis. The payments mentioned in the contracts were required to be made at the company's office in Minneapolis.

"The fact that the land was situated in the state of Colorado did not relieve appellant from the operation of the statute above referred to. Upon a repudiation of the contracts by the seller, two courses of action were open to the purchaser; he might stand by the contract and seek to recover the land, or he could declare upon a breach of the contract and recover the amount of his damages.

"If he elected to pursue the land, the courts of Colorado alone could give him relief. He has elected to seek redress for damages for a breach of the contract; hence, the courts of this state are open to him for that purpose. This is a general rule: where a contract is made in one state for the purchase of land located in another state, the **lex loci rei sitae** will govern as to the title of the land, and the **lex loci contractus** as to the rights of the party in the contract. Wharton on Conflict of Laws, Vol. 1, P. 616. Story on Conflict of Laws, 8th Ed. P. 591."

The constitutional questions were then raised upon petition for re-hearing, which was denied.

Again the constitutional questions were raised upon the second appeal in the Finnes case, the opinion being reported in 108 Minnesota 331, the Court here saying in part:

> "The appellant now contends (a) that the contract set up in the first cause of action is an option contract (b) that notice of termination of these contracts upon lands in Colorado according to the laws of Minnesota is not required, (c) that the Minnesota Statutes if construed to apply to lands outside of the State would be unconstitutional. These questions were all adjudicated upon the former appeal and will not be reconsidered."

The final decision in the line of cases is that in the case at bar quoted above, (Transcript P. 99).

The Finnes case is also upon the calendar of this Court and there is much litigation between other parties which will be ruled by the decision here.

A very careful search discloses the fact that no State of the Union has attempted this character of legislation except Minnesota, North Dakota and Iowa. The Iowa statute expressly applies to "contracts for the sale of land **in the State of Iowa,**" (Codes No. 4299-4300) and the North Dakota statute (R. C. 1905, No. 7494-5), although substantially the same as that of Minnesota, has never been construed by the Supreme Court of that State with reference to its applicability to contracts of this character.

The defendant in error stands in the position of admitting the default, admitting the right of the plaintiff in error to terminate the contract on account thereof, admitting that the notice as given was sufficient for that purpose unless controlled by come statute of greater force than the contract and the common law; and relies solely upon the statute of Minnesota and its applicability to this contract as the basis of all her rights—all other questions having been expressly stipulated out of the case. (Trans. P. 99, F. 101.)

This record is brought here for the purpose of testing the validity of this statute as it has been construed by the Court below to apply to contracts of this character, and to challenge the right and power of the State of Minnesota to enact legislation respecting contracts for the transfer of land in another state or providing for redemption thereunder, after foreclosure of rights in the land according to the law of such other state; or to disregard the laws of such other state by a decision of its court of last resort.

ASSIGNMENT OF ERRORS:

I.

Chapter 223, Laws of Minnesota for 1897, as amended by Chapter 294, Laws of Minnesota for 1901, as construed by the Supreme Court of Minnesota to cover contracts such as that involved in the case at bar, is void as being repugnant,

(a) To Section One (1) of Article 14 of the Amendments to the Constitution of the United States, in that it deprives plaintiff in error of its liberty and property without due process of law.

(b) To Section One (1) of Article 14 of the Amendments to the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws.

II.

The holding by the Supreme Court of Minnesota that such statutes apply to and govern the contract in question, is, in and of itself, the act of the State and as such is in violation of Section 1, Article 14, of the Amendments of the Constitution of the United States, in that it

(a) Makes and enforces a law which abridges the privileges and immunities of plaintiff in error as a citizen of the United States.

(b) Deprives plaintiff in error of its liberty and property without due process of law;

(c) Denies to it the equal protection of the laws.

III.

The Court by its decision fails to give full faith and credit to the Acts and records of the State of Colorado, contrary to Article I. of Art. IV. of the Constitution of the United States.

POINTS AND AUTHORITIES.

1.

THE LEX LOCI REI SITAE APPLIES TO ALL MATTERS WITH REFERENCE TO THE TRANSFER OF LANDS INCLUDING CONTRACTS FOR THE PURCHASE AND SALE THEREOF.

The holding of the Court below in this case is that the statute of Minnesota applies to and governs all contracts made in Minnesota by the terms of which the payments are to be made in that State, without reference to the residence of the vendee and without regard to whether or not the vendor by pursuing or attempting to pursue the remedy given by the Minnesota statute would be able to obtain any benefit.

In the case as bar the plaintiff in error is held to have breached the contract by a refusal to recognize it as a valid instrument after it had been regularly terminated in accordance with its terms, the common law, the law of the State in which the land is situate.

There would be infinitely more reason for holidng that the State of Minnesota had a right to prohibit the foreclosure of mortgages made in that state and payable there upon land in another state, or to dictate the period of redemption under such mortgages than it would to hold it to have power to make such prohibitation respecting contracts for the sale of lands in another State. Such mortgage is a mere incident by way of security to the debt; the debt evidenced by a note or bond being the primary contract and the mortgage mere collateral security. Such a transaction is originally personal in its nature having to do with the loaning of money by one man to another; whereas the transaction at bar has reference to nothing whatever except the right on the part of the vendee to receive title to land in another State at a certain time and upon performance of certain conditions. The latter transaction has practically no personal aspect. The duty of one party to convey and the right of the other to receive such conveyance cover the entire ground. Such duty and such right are referable solely to the provisions of the laws of the State where the land lies.

The law of the State in which mortgaged property is situated governs the redemption.

In the case of Brine vs. Insurance Co. 96 U. S. 627, the above proposition is affirmed and a review made of the decisions upon the subject up to that time.. The court says in part:

> "On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State existing at the time a mortgage or

any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts."

"We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from State control of the chancery practice of the Federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way."

"The earliest utterance of the court on the subject is found in the case of the United States v. Crosby (7 Cranch, 115), in which this explicit language is used: 'The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' And in Clark v. Graham (6 Wheat. 577) it said: 'It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate."

"In the case of McCormick v. Sullevant (10 id. 192), the court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the devisor resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that State, as the law of Ohio required. 'It is an acknowledged principle of law,' said the court, 'that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another."

"In the case of Watts et al. v. Waddell et al. (6 Pet. 389), a question very much like the one before us arose Watts was seeking to compel Waddell to accept a deed and pay for land which he had sold him many years before, the relief sought being in the nature of specific performance. It was objected that Watts could not convey a good title to a part of the land which he claimed to receive from the heirs of Powell by a decree rendered in the Circuit Court for the District of Kentucky. And although the proper parties were before that court, and a conveyance had been made to Watts by a commissioner appointed by the court, it was held that, as no statute of Ohio recognized such a mode of transferring title, the deed of the commissioner was wholly ineffectual. It will be seen that here was a court of equity,

proceeding according to its usual forms, transferring title from one party to another, both of whom were before the court, yet its decree held wholly ineffectual under the principle we are considering."

"We will close these citations by using the language which had the unanimous assent of the court in the recent case of McGoon v. Scales (9 Wall. 23): 'It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

"At all events, the decisions of this court are numerous that the laws which prescribed the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no change in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States. Edwards v. Kearzey, supra, p. 595. That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of Bronson v. Kinzie, 1 How. 311."

"In Clark v. Reyburn (8 Wall, 318), the court, in recognition of the doctrine that the statute becomes a part of the contract, uses this language: 'In this country, the proceeding in most of the States, and perhaps in all of them, is regarded by statute. The remedy thus provided, when the mortgage is executed, enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract," within the meaning of the provision of the Constitution upon the subject.' ".

"In regard to land contracts the lex situs is the proper law of the contract."

Dicey, Conflict of Laws, 573.

"The common law has avoided all difficulties by a simple and uniform test. It decrees that the law of the situs shall govern in regard to all right, interests and titles in and to immovable property."

"Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withdraw the capacity to acquire or dispose of immovable property."

Story, Conflict of Laws, p. 591, No. 424.

In Tillotson v. Prichard, 60 Vt. 94-107, the court says:

"The covenant sought to be enforced was contained in a deed executed in Vermont, the grantor domiciled there, the grantees in New Hampshire. The land described in the deed was located in Minnesota. The question arises by what law is the contract to be governed? The defendant insists that the question must be decided according to Minnesota Law, and the plaintiff's counsel invoke the aid of that law upon questions of the execution of the deed and the transitory character of the action. The contract being one which could only be performed in Minnesota, the parties evidently had in view the law of that State in reference to its execution. We think its construction and force including the rules as to damages must be governed by the laws of that State." 2 Kent. Com. 459. 'The law of the place where performance is to occur governs in respect to the validity and performance of contracts made in one State but to be performed in another.' Rorer Int. St. Law 50. Matters connected with performance are regulated by the law prevailing at the place of performance.' Scudder v. Bank, 1 Otto 406-413."

In re Kellogg, 113 Fed. 120.
Bendey v. Townsend, 109 U. S. 665.
Orvis v. Powell, 98 U. S. 176.
Smith v. Smith, 102 U. S. 442.
Mason v. N. W. Mutual Life Ins. Co., 106 U. S. 163.
Parker v. Dacres, 130 U. S. 43.

Capacity to contract regarding the sale of lands depends on the laws of the State wherein the lands are situate.

Rorer on Inter-State Law, 190-207, No. 1.

The Courts of one State can not order the sale of lands in another.

Watkins vs. Holman, 16 Peters (U. S.) 26-57.
U. S. vs. Fox, 4 Otto 315-320.
Rorer on Int. St. Law, 208, Sec. 11; 209, Sec. 1.

That State laws have no extra territorial effect is undoubted.

Brine vs. Hartford Fire Ins. Co., Supra.
Lyons vs. McIlvaine, 24 Ia. 9.
Rorer Int. St. Law, page 167 and cases cited.

A statute of redemption affects the right and not the remedy.

Bronson vs. Kinzie, 1 How. 311-14.
Green vs. Biddle, 8 Wheaton, 75-6-84.

The common law right of termination entered into this contract in its inception and the right of the vendor to foreclose in this matter is just as binding as would have been the right of redemption of the vendee had one been given him by statute in Colorado at the time of the contract.

II.

UNDER THE COMMON LAW PARTIES HAVE THE RIGHT TO CONTRACT AS THEY WILL RESPECTING TIME BEING OF THE ESSENCE OF SUCH A CONTRACT AND AS TO THE CONDITIONS AND CIRCUMSTANCES UNDER WHICH SAID CONTRACT SHALL TERMINATE; AND THE COURTS WILL RESPECT AND CARRY OUT SUCH STIPULATIONS TO THE LETTER.

As was said by this court in Cheney vs. Libby, 134 U. S. 68-77.

"Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser." Taylor vs. Longworth, 14 Pet. 172, 174; Secombe vs. Steel, 20 How. 94, 104; Holgate vs Eaton, 116 U. S. 33, 40; Brown vs. Guarantee Trust Co. 128, U. S. 403, 414. The parties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be performed, but declare that "time and punctuality are material and essential ingredients" in the contract; and that it must be "strictly and literally" executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and, therefore, a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves. 1 Sugden on Vendors, 8th. Amer. Ad. 410 (268). Barnard vs. Lee, 97 Mass. 92, 92; Hipwell vs. Knight, 1, Younge & Coll. Exch. 401, 415."

MacKey vs. Ames, 31 Minn., 103.
Schuman vs. Mack, 35 Minn., 279.
Dana vs. St. P. Inv. Co., 42 Minn., 194.
Pagel vs. Park, 50 Minn., 186.
Joselyn vs. Schwend, 85 Minn., 130.
Tinque vs. Patch, 93 Minn., 437.
Schwab vs. Baremore, 95 Minn., 295.
Crisman vs. Miller, 21 Ill., 227-235.
Heckord vs. Sayne, 34 Ill., 142.
Apking vs. Hoffer, 104 N. W. (Neb.) 1.
Iowa R. L. Co. vs. Mickel, 41 Ia., 402.
St. Louis Trust Co. vs. York, 81 Mo., App. 342.
Coughran vs. Bigelow, 9 Utah, 200.
Woodruff vs. Semi Tropic Land & Water Co. 87 Cal., 275.
Oxford vs. Thomas, 160 Pa. St. 8.
Gilbert vs. Union Pacific R. R. Co., 112 N. W. (Neb.)
Murphy vs. McIntyre, 116 N. W. (Mich.) 197.

III.

ANY ATTEMPT ON THE PART OF THE STATE OF MINNESOTA TO AUTHORIZE THE FORECLOSURE OF SUCH A CON-

TRACT WOULD BE, IF EFFECTIVE TO ANY DEGREE AS AGAINST THE NON RESIDENT VENDEE, A TAKING OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND WOULD DENY HIM THE EQUAL PROTECTION OF THE LAWS.

Pennoyer vs. Neff, ~~94~~ 95 U. S. 714.

So far as the non resident vendee is concerned, neither the legislature of Minnesota nor its Court could do anything under these statutes which would in any manner be binding upon him. The vendor could not under these statutes even commence proceedings with respect to a non-resident vendee and foreign lands since the first step required of him is that he obtain the return of the Sheriff "**of the County in which such real estate is situated, that such person can not be found in his county.**" Being unable to do this he could not possibly lay any foundation for publication. But assuming in some manner that he may do so, the law then requires that the notice be published in the "**County where the land lies.**" This of course could not be done. The statute plainly meaning the county **in Minnesota** in which the land is situate. How would the vendor determine whether or not there was a newspaper published in the County where the land lay within the State when the land was not situate in any County of the State? The provision that publication might be made in a newspaper published at the capitol of the State of Minnesota does not help the vendor any for two reasons:—first, that he can not lay any portion of the foundation necessary to authorize in a proper case such publication, and, second, any such publication that he may attempt therein would be a waste of time as against any of the rights of the vendee.

Let us suppose that the Vendee had the right to a notice of

sixty (60) days after default in some State wherein the land lay, and the vender under this Minnesota statute, should be able to comply with whatever requirements there were, upon what theory could the vendee's right to redeem in accordance with the law of the State where the land lay be in any manner controlled or interfered with by such action on the part of the vendor in the State of Minnesota, when such vendee is not served within the State with any notice and the land is in a foreign jurisdiction? As to such vendee these statutes do not furnish due process of law even if it were physically possible to comply with them.

IV.

See cases under V.

IT IS PHYSICALLY IMPOSSIBLE FOR THE VENDOR IN THIS CONTRACT TO COMPLY WITH ANY OF THE REQUIREMENTS OF THE SAID STAUTE OR TO OBTAIN ANY BENEFIT FROM ITS PROVISIONS.

It is very evident from the statute itself that the vendor can lay no foundation for substituted service, and if he did, it would be of no benefit to him whatever.

The statute as construed deprives him of the protection of the common law or of the law of the state of the situs, at the same time granting to the vendee all the protection which those laws would give him; it is powerless to take from the non-resident vendee any right which he possesses under the constitution as against the vendor, whether the same arises out of the contract of the parties or some law of the state of the situs; while it strips the vendor of ever every right by prohibiting him from terminating his contract at all.

He may not foreclose at all in Minnesota; and if he does elsewhere, no matter whether he proceeds under the contract or under a statute of the state of the situs, it is held for naught, and his contract considered to be in full force against him, with nothing but the six year statute of limitation to save him from the penalty; and the only basis for this is that the contract was made in Minnesota and the balance of the purchase price was to be made there.

If the vendee simply records his contract in the records of the County in Colorado, it is most evident that nothing short of an action in Colorado would ultimately clear the record for the vendor and the Court in that action would of necessity pass upon the validity of the termination of the contract, and too, according to the law of its own State.

The suggestion seems an idle one that in such an action the Colorado court would pay any attention whatever to any legislation on the part of Minnesota, much less to any record based upon no service at all and where no jurisdiction could be obtained as against the vendee or the land itself.

Let us suppose that the vendee not only records his contract but goes into possession of the land. He could not possibly be dispossessed by any proceeding authorized by the Legislature of Minnesota and certainly the Colorado Court which is asked to dispossess him and cancel the record of his contract, will not pay any attention to any proceeding of this sort had in Minnesota.

The latter Court would take notice of nothing short of such a record authorized by the State of Minnesota as would come within the full faith and credit clause of the Constitution and manifestly the proceeding authorized by this statute, even if it were possible to comply with it as a matter of form, would furnish no such record.

For the state in which land lies to shorten the time of redemption by a law passed after a mortgage or land contract was made would be to impair the obligation of the contract as to the vendee, and if it lengthened the time of redemption it would be similarly impaired as to the vendor. (Brine vs. Hartford Insurance Co. supra); and this would be true though the State had jurisdiction over the subject matter. But what shall be said of the right of a State to assert jurisdiction over the time of redemption where the land is not within its borders, neither the person of the vendee, and to the extent, even, of actually prohibiting any termination whatever?

"The means of enforcement of a Contract is the breath of its vital existence and is inseparable from the right."

Edwards vs. Kearzey, 96 U. S. 595,
Fletcher vs. Peck, 6 Cranch, 87,
Green vs. Biddle, 8 Wheat, 1,
Sturges vs. Crowninshield, 4 id. 122,
Ogden vs. Sounders, 12 id. 213,
Bronson vs. Kinzie, 1 How, 311,
McCracken vs. Hayward, 2 id. 608,
Curran vs. Arkansas, 13 id. 304,
Freeman vs. Howe, 24 id. 450,
Von Hoffman vs. Quincy, 4 Wall. 535,
Hawthorne vs. Calef, 2 id. 10,
White vs. Hart, 13 id. 646,
Gunn vs. Barry, 15 id. 610,
Walker vs. Whitehead, 16 id. 314.

Such a contract might well be made for the sale of lands in Canada, China or India, where laws may be made and altered without regard to any of our constitutional restrictions. Surely there would be no obligation on the part of the courts of those countries to recognize as affective a method of foreclosure of such a contract founded upon the statutes of Minnesota.

V.

THE STATE OF MINNESOTA WAS WITHOUT POWER TO AUTHORIZE EITHER BY A DIRECT ACTION IN EQUITY OR BY SUBSTITUTED SERVICE THE FORECLOSURE OF SUCH A CONTRACT WHEN NEITHER THE PERSON TO BE AFFECTED NOR THE THING ITSELF WAS AT ANY TIME WITHIN THE TERRITORIAL JURISDICTION OF THE STATE.

In the opinion herein the Court below finally concludes that this statute is constitutional because it regards it as "**a statute providing for redemption.**"

In the case of Hage vs. Benner, 111 Minn., 305, the same Court describes this statute as follows:

> **The statute being one authorizing the summary termination of the Contract, and a divestiture of the equitable rights of the vendee, must be strictly complied with."**
>
> **Such statute is beyond the power of the state to enact or enforce.**

Bronson vs. Kinzie, 1 How. 311.
Watts vs. Waddell, 6 Peters 389.
Kendall vs. United States, 12 Peters 524.
Boswell vs. Otis, 9 How. (U. S.) 336.
Howes vs. Hardeman, 14 How. (U. S.) 334.
Tennessee vs. Sneed, 96 (U. S.) 69.
Allis vs. Insurance Co. 97 (U. S.) 145.
Orvis vs. Powell, 98 U. S. 176.
Schley vs. Pullman Palace Car Co. 120 U. S. 575.
Langdon vs. Sherwood, 124 U. S. 74-6.
Bacon vs. Northwestern Mutual Ins. Co., 131 U. S. 258.
McGahey vs. Virginia, 135 U. S. 662-694.
Goldey vs. Morning News, 156 U. S. 521.
Barwitz vs. Beverly, 163 U. S. 127.
DeVaughn vs. Hutchinson, 165 U. S. 570.
Duer vs. Blockman, 169 U. S. 243-7.
Caledonia Coal Co. vs. Baker, 196 U. S. 444.
Ex Parte Young, 209 U. S. 123.
Fall vs. Eastin, 215 U. S. 1-8.

Kuhn vs. Fairmont Coal Co., 215 U. S. 349-67-69-72.
Benedict vs. St. Joseph W. Ry. Co., 19 Fed. 176.
Singer Mfg. Co. vs. McCullock, 24 Fed. 669.
Union Mutual Ins. Co. vs. Union Mills Co. 37 Fed. 292.
Central Trust Co. vs. Union Etc. Ry. Co., 65 Fed. 257-9.
Southern Ry Co. vs. Bouknight, 70 Fed. 442-6.
Deck vs. Whitman, 96 Fed. 873-84.
Nelson vs. Potter, 50 N. J. L. 324-6.
Lindley vs. O'Reilly, 50 N. J. L. 636-43.
Second Ward Saving's Bank vs. Schrank, 97 Wis. 250-262.
Griffin vs. Griffin, 18 N. J. E. 104-7.
Jackson vs. Dunlap, 1 Johns, 114..
Jackson vs. Parkhurst, 4 Wend 369.
Rockwell vs. Hobby, 2 Sanford C. R. 9.

"Considered from an international point of view, jurisdiction to be rightfully exercised must be founded upon the person being within the territory—for otherwise there can be no sovereignty exercised."

Story on Conflict of Laws, 754 No. 539.

"The only jurisdiction which a court of equity exercised with respect to lands in another state is such as it can exercise over and through the person of the defendant within its jurisdiction and not otherwise."

Wharton on Conflict Laws, P 64 No. 288-9.

In Boswell's Lessee vs. Otis, 9 How. (U. S.) 336-348 it was said:

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court."

Mr. Justice Field says in United States vs. Fox, 94 U. S. 315-320.

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by

its owners, is undoubted. It is an established principle of law, everywhere recognized arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

In Pennoyer vs. Neff, 95 U. S. 714, it is said:

"One of these principles is, that every State possesses exclusive jurisdiction and sovereignity over persons and property within its territory.

"The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.

"It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate."

In Freeman vs. Alderson, 119 U. S. 185-7 Mr. Justice Field says:

"The State has jurisdiction over property within its limits owned by non-residents, and may therefore, subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property, as we said on a former occasion that its tribunals can inquire into the non-resident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the non-resident possesses no property in the State, there is nothing upon which its tribunals can act."

In Arndt vs. Griggs, 134 U. S. 316-320, Mr. Justice Brewer, says:

"If a State has no power to bring a non-resident into its courts for any purposes by publication, it is important to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim

of a non-resident will remain for all time a cloud unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignity of the State. It has control over property within its limits; and the conditions of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the public, and the modes of establishing titles thereto. It can not bring the persons of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

In Dewey vs. Des Moines, 173, U. S. 193-204 Mr. Justice Peckham says:

"The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a State from taking jurisdiction through its courts, by virtue of any statute, over a non-resident, not served with process within the State, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. This principle has been frequently decided in this Court."

In Overly vs. Gordon, 177 U. S. 214-222, it is said:

"The sovereignity of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State. To quote the language of Mr. Chief Justice Marshall in Rose vs. Hinely, 4 Granch, 241, 277.

"It is repugnant to every idea of a proceeding in rem to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely ex parte."

Old Wayne Ins. Co. vs. McDonough, 204 U. S. 8, 21-22.

In Elliot vs. McCormick, 144 Mass. 10:

The doctrine of Pennoyer vs. Neff is followed and the previous decisions of the Massachusetts court to the contrary overruled.

Cooper vs. Reynolds, 10 Wall 308.
Eastman vs. Wadleigh, 67 N. H. 251.
Esterly vs. Goodwin, 35 Conn. 273-7.

According to doctrine of the court below, the State of New York would have the right and the power to ordain that all mortgages made in New York to a mortgagee residing therein, and payable in New York, must be foreclosed according to the laws of New York, and not in accordance with the laws of the State wherein the land is situated; and that if such a mortgage were foreclosed by advertising in accordance with the laws of the state or county wherein the land was situated and such law allows the mortgagor, we will say, six months in which to redeem and the law of New York allows two years, the mortgagee after six months had elapsed and before two years had gone by, could come to the mortgagee in New York and tender the amount of the debt with interest and compel the mortgagee, which had in the meantime sold the porperty, to account to him for its full value **at time of the tender.**

Strictly speaking the contract was not made in Minnesota, and the holding of the court below that it was is against the great weight of authority. The contract became effective upon its acceptance and signature by the vendee in North Dakota.

Killeen vs. Kennedy, 90 Minn., 414.
Stockham vs. Stockham, 32 Md., 196.
Milliker vs. Pratt, 125 Mass., 374.
Bauer vs. Shaw, 168 Mass., 198.

Abbott vs. Shepard, 48 N. H., 14.
Hass vs. Myers, 111 Ill., 421.
Crandall vs. Willig, 166 Ill., 233.
Palrick vs. Bowman, 149 U. S., 411-24.
Machine Co., vs. Richardson, 89 Ia. 525.
Cooper vs. Company, 94 Mich, 272.
Tolman Co. vs. Reed, 115 Mich., 71.
2 Kents Comm. 47.
1 Parsons Contracts 475.
1 Story CONTRACTS 490.
Hilliard on Sales, Sec. 20
Benjamon on Sales, Sec. 73.
Bascom vs. Ediker, 48 Nebr. 380.
Gay vs. Rainey, 89 Ill., 221.
Eliason vs. Henshaw, 4 Wheaton, (U. S.) 225.
McIntyre vs. Parks, 3 Metc. (Mass.) 207.
Buchanan vs. Bank, 55 Fed. 223.
Western etc. Co. vs. Kilderhouse, 87 N. Y. 430.

"The place of the acceptance of a proposition is the place of the contract. Where a written contract, signed by one party is forwarded to be signed by another the place of signature or assent is the place of the contract."

Wharton on Conflict of Laws, P. 886, 421-2.

"The ultimate criterion of the place where the contract is deemed to have been made is the place where the last act necessary to complete the contract was done."

Emerson Co. vs. Proctor, 97. Me., 360.
Northampton Insurance Co. vs. Tuttle, 40 N. J. L. 176.
Hill vs. Chase, 143 Mass., 129.

"A contract exists and becomes effective as soon as one copy thereof is executed and the subsequent execution of a duplicate is mere formality, a ministerial act, not effecting the nature of the contract itself."

Morehouse vs. Terrill, 111 Ill., App. 460.

"The law of the place where an agreement is finally consummated will govern the contract, unless it is shown that the same was to be performed elsewhere."

Born vs. Insurance Co. 120 Ia., 290.

"The place where the last act is done which is necessary to give validity to the contract is the place where the contract is made, and where the contract for the sale of real estate was written in one State and was signed on behalf of the vendor who sided in another State, by one wholly unauthorized to make or sign it, and was thereafter forwarded to the vendor, was replied by letter, assenting thereto, the contract was made in the State of the vendor, his assent being given there and being the last act necessary to make the writing valid a contract."

Lawson vs. Tripp 90. P. (Utah,) 500.

In Emerson Company vs. Proctor, 97, Me., 360.

"The contract was signed by the plaintiff in Maryland and mailed to the defendant in Maine, signed by the defendant in Maine, and remailed by him to the plaintiff in Maryland—held, the contract was made in Maine."

"To the same effect, Gallaway vs. Standard Insurance Co. 45 W. Va. 237. No contract exists until the offer which has been made is accepted."

Rickard vs. Taylor, 122 Fed. (C. C. A.) 931.
Newlin vs. Prevo, 90 Ill., App. 515.
Central of Georgia Railway vs. Gortalowiski, 123 Ga. 366.
Waldron vs. Ritchings, 9 Abb. Pr. (N. S.) 359.
Aultman, Millers Co. vs. Holder, (C. C.) 68 Fed. 467.
Perry vs. Iron Co. 15 R. I. 380.
Cobb vs. Dunleavi, 6 S. E. (W. Va.) 384.
Bank vs. Doedny, 113 N. W. (S. D.) 81.

"Contract made by telephone by persons in different counties is made where the person is who accepts the offer of the other"

Bank of Yolo vs. Sperry Flour Co. 90 Pac. (Cal.) 855.

But assuming that the plaintiff in error is unable to raise that question in this court, attention at least may be called to the fact that the taxes were to be paid in Colorado and could be paid no

where else. The act of performance, default in which gave the admitted right to terminate the contract, arose not in Minnesota but in Colorado where alone the taxes were to be paid. There was no breach at the time of any act to be performed by the vendee in Minnesota. The alleged breach by the vendor consists wholly in refusing to recognize Defendant in error as entitled to what? To a Warranty Deed, which when recorded in Colorado would there convey a good title; a deed which could be recorded nowhere else and which in order to be a compliance with the terms of the contract must when so recorded, actually convey a good title. A deed fair on its face would be insufficient unless the record in Colorado showed title in vendor free fro mall liens and encumbrances.

The subject matter of the contract was the land itself and the right of the vendee to receive the title to the same by deed upon the performance of the conditions. As soon as the contract was delivered the vendee became the equitable owner of the land and the vendor thereafter held the legal title as trustee for the vendee until conditions had been performed.

The question before this court is whether the State of Minnesota can by statute prohibit the divestment of such equitable title and ownership to lands in another state or foreign country by such or any statute. It is conceded here that unless it can do so lawfully the judgment herein must be reversed.

Suppose the Minnesota Legislature passed a statute providing that no mortgage given to any mortgagee resident in Minnesota, where the papers are delivered in Minnesota and covering lands without that state should ever be foreclosed at all, denying both parties to the transaction the right to provide for its foreclosure in the instrument itself and denying to the legislative bodies of all

foreign states and countries the right to provide for such foreclosure? Such a proposition would be utterly absurd, because the State of Minnesota would have no power to pass and enforce such an act and if it attempted to do so its action would be held nugatory and void under the constitutional provisions herein appealed to. And yet that is exactly what is attempted by the statute and decision in this case as to land contracts.

Suppose Minnesota should pass a statute providing that all leases of real property elsewhere than in the State of Minnesota, but which were executed in the state in favor of the lessor residing therein should not terminate for six years after the date the parties might agree in the lease itself that the same should terminate; and that if the lessor should attempt in any manner anywhere to terminate the lease in accordance with its terms, his act should be held in Minnesota to be invalid, and he be muleted in damages on the theory that the lease continued for six years to be binding.

Quite as lawful would be an act on the part of Minnesota prohibiting any resident of the state owning lands in Asia from making a will devising any such real estate except to the persons and under the conditions named in the statute.

Under the authorities above cited it seems plain that the State of Minnesota would have been powerless to have authorized its courts to take jurisdiction of an action by the vendor against the vendee in Minnesota for the purpose of terminating such a contract, where neither personal service upon the vendee was possible within the State and the land was in a third state; and surely what it could not authorize to be accomplished by means of an action in equity it could not authorize by any proceeding of lessor dignity, such as the publication of a mere notice.

VI.

SUCH STATUTES ARE VOID AS DEPRIVING PLAINTIFF IN ERROR OF ITS LIBERTY WITHOUT DUE PROCESS OF LAW.

In Mathews vs. People, 202 Ill., 389, the supreme court of Illinois in declaring unconstitutional a statute interfering with the right of employers to contract as they pleased for labor, said:

> "It is now well settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts because the right to make and enforce contracts is included in the right to acquire property."

It has also been held that the right to liberty and property under the bill of rights in the United States constitution and the United States constitutional amendments above referred to and a similar provision in the constitution of the state of Illinois, includes the right to terminate contracts as the contracting parties see fit. Gillespie vs. People, 188 Ill., 176.

With this constitutional right to contract and terminate contracts, the legislature cannot interfere:

Ritchie vs. People, 155 Ill., 98.
Frorer vs. People, 141 Ill., 172.
State vs. Julow, 129 Mo. 163.
City of Cleveland vs. Clements Bros. Construction Co. 67 Ohio St. 197.

In Shaughnessey vs. American Surety Co., 138 Calif. 543, 545, the court held unconstitutional a statute requiring contractors to give bonds against mechanics' liens as an unwarranted interference with the right to contract and a discrimination between different classes of contracts. The same vice condemned in the case last

cited is inherent in this statute requiring notice of termination of a contract which the parties have agreed in the contract that it shall terminate in a definite manner and without notice.

In holding unconstitutional a statute requiring bonds of executors and fiduciaries to be executed by surety companies as sureties rather than individuals, the supreme court of Ohio said, in State vs. Robbins, 71 Ohio St. 273, 290:

> "Liberty of contract is one of the inalienable rights of man which is granted to every citizen by the bill of rights subject only to such restrictions as clearly appear to be for general welfare,"

and further held that the Legislature

> "cannot deny or restrict the liberty of the officer or fiduciary to obtain or contract for a bond on terms satisfactory to himself."

To the same effect is Kuhn vs. Common Council, 70 Mich. 534, holding unconstitutional a statute prohibiting liquor dealers from becoming sureties on other liquor dealers' bonds.

In the case at bar, the legislature has undertaken to make valid and binding a contract which the parties themselves have declared void in haec verba in the contract itself. The situation is an exact parallel to that found in Andrews vs. Beane, 15 R. I. 451, where a statute of Rhode Island was passed attempting to validate without consent of the obligators, appeal bonds signed by the agent or attorney for the appellant. The court said (p. 452):

> "It will be observed that the section, if it applies, validates the bonds absolutely without regard to whether the persons whose names are signed consent to the validation or not. The bond here given was a nullity when given; can it become the obligation of the plaintiffs' independently of their sanction, by force of such a mere legislative fiat?"

The Court holds it to be beyond the power of the legislature and says further that to sustain such would be to hold "that it is competent for the legislature to impose upon a person a contract which he has neither entered into nor adopted nor intended to enter into or adopt, either personally or by attorney, and all the cases concede that this is something which the legislature cannot do." To the same effect is Powers vs. Shephard 1. Abb. Pr. (N. S.) 129; 45 Barb. 524.

The statute here involved denies the right of contracting parties to fix the terms on which their contract shall terminate or to waive notice of termination. This has been held to be an unwarranted interference with the right to contract.

Shaver vs. Pennsylvania Co. 71 Fed. 931.

This Court in several important cases has affirmed the same doctrine under the provisions of the 5th and 14th. amendments to the constitution of the United States.

Lockner vs. New York, 198 U. S. 45, 25 Sup. Ct. 539.
Adair vs. United States, 28 Sup. Ct. 277.
Alleyer vs. Louisiana, 165 U. S. 578.

U. S. 45, 25 Sup. Ct. 529; Adair vs. United States, 28 Sup. Ct. 277; Alleyer vs. Louisiana, 165 U. S. 578.

Liberty of contract granted by the Constitution is liberty to contract respecting a subject matter with reference to the laws of the state having exclusive jurisdiction over such subject matter. The prohibition of this Minnesota statute denies the vendor the right to contract with his vendee for the sale of real property with reference to the laws of the State where the land is situate. If

Minnesota can deny to such vendor the right to terminate such contract of sale, why could it not prohibit the making of such a contract altogether? Denial of a right to terminate the contract except at the peril of the penalty which has been imposed upon the plaintiff in error in this case, amounts practically to a prohibition of the right to contract in Minnesota to sell land in other states. The assertion by the state of the right to prohibit the making of such a contract, except upon such terms as it sees fit to impose upon the vendor, tends directly to destroy the property rights of the vendor in his said real property. He buys and holds it knowing it to be subject to reasonable regulation by the state wherein it lies. And to force upon him the burden of regulation and prohibition by another state, plainly renders his title less desirable and his right to enjoy and sell his property of less value.

To be safe from the penalty assessed against this plaintiff in error he must decline to sell on a contract so long as he lives in the State of Minnesota and wait the arrival of a cash purchaser. The only way he can avoid the penalty above referred to is to move out of the state of Minnesota and do business elsewhere.

Liberty of contract is subject to reasonable police regulation by the state, but only with respect to a subject matter over which it has jurisdiction. To prohibit the making of a certain kind of contract respecting the transfer of land in another state, is to deprive the citizen of his liberty of contract.

VII.

SUCH STATUTES ARE VOID AS DEPRIVING THE PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The prohibition of these statutes tends directly and as a practical result to lessen the value of lands in other states owned by residents of Minnesota and thus a direct burden is placed upon such ownership contrary to law.

If the State of Minnesota has the power to thus burden the transfer of real property of its citizens, by a statute providing for a period of redemption of thirty days, it might by amendment make it two, three or five years. Diminution of value of such land to such resident owner would simply be greater under such a statute than under the one at bar, but the principle would be the same.

The right to enact a statute allowing a period of redemption is referable to the police power, depending wholly upon the territorial jurisdiction over the subject matter. It might be held a valid exercise of that power for Minnesota to allow a long period of redemption in connection of the foreclosure of entracts for the sale of land lying wholly within its borders; but when such a statute is enacted covering transfers of land in any other state or foreign countries, the right to sell, being one of the most important attributes of the ownership of property, becomes of less value. And it is easy to be seen what such decrease in value of the citizen's property would be in case the State of Minnesota by legislation asserted its right against its own citizen to compel him to pay to it taxes upon lands owned by him in other states. Such legislation could only be based upon his presence in the state, and of course, would be an absurd assumption of power. The answer which such an owner would make in Court to the enforcement of such a tax against him personally would be exactly the answer which we make herein.

Even assuming that the prohibition of agreement upon this sub-

ject upon the parties is valid, an adequate remedy must be supplied and an impossible remedy is none at all.

This brings the legislation in question within the rule that the abolishment of all remedy is objectionable to the Constitution in that it deprives the citizen of his property without due process of law.

Black on Const. Prohibitions Sec. 146-171.
Sutherland on Statutory Construction Page 1206, 5 and cases page 1208, No. 8 and cases.
Lutz vs. City of Muscatine, 8 Wall, (U. S.) 575.

VIII.

SUCH STATUTES ARE VOID BECAUSE THEY DENY TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS.

If the state of the suits has the power to regulate the transfer of the title to lands, then such rules as it prescribes with reference to land contracts, their foreclosure, termination and redemption, are rules of property binding upon the non-resident of the state of the situs and upon the sister states as well; and if the Minnesota vendor is bound by whatever valid regulations of land contracts and redemption rights are made by the state of the situs, then the vendee is equally bound. To hold that the vendor is bound by such regulations and that the vendee may take advantage of any benefit which may accrue to him under such laws as he sees fit, but that he is not limited thereby, having still the privilege of availing himself of the rights given him by the Minnesota statutes; is to hold that the vendee is entitled to the protection of either of two sets of laws at his election, while the vendor is entitled to the protection of none.

It is unthinkable that a transfer or a right to transfer immovable property should be subject to regulations at the same time by two different and distinct sovereignties. In so far as the State of Minnesota penalizes its resident owner because he has obeyed the law of the state or country wherein the land is situated—the law which he must be subject to—just so far does it exceed its powers and deny to its citizen the equal protection of the laws.

Price et al vs. Pennsylvania, 113 U. S. 218.
Allen vs. St. Louis Bank, 120 U. S. 27.
Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150.
Magoun vs. Illinois Trust Co., 170 U. S. 283.
Connolly vs. Union Sewer Pipe Co., 184 U. S. 544.
Massie vs. Cesna, 239 Ill., 352.
Cincinnati S. R. Co. vs. Snell, 193 U. S. 30.
Ex parte Hollman, 60 S. E. (S. C.) 19-25.
Ex parte Hawley, 115 N. W. (S. D.) 93.
American De F. W. T. Co. vs. Superior Court, 90 P. (Cal.) 15.
In re Van Horne, 70 Atl. (N. J.) 986.
Greene vs. State, 122 N. W. (Nebr.) 6.
Lovely vs. M. K. & T. Ry. Co. 120 S. W. (Mo.) 852-6.
Hoxie vs. N. Y. N. H. & H. R. Co. 73 Atl. 754, 20.
The Employers Liability Cases, 207 U. S. 463-501.
Seaboard Air Line R. Co. vs. Railway Com'rs., 155 Fed. 792.
Board of Education vs. Alliance Assurance Co. 159 Fed. 994. No. 3.
Phipps vs. Wisconsin Central Ry. Co., 133 Wis. 153.

An attempt to give to resident owners of Minnesota land the right to foreclose their contracts in a certain way and to prohibit them from doing it in any other way might be upheld; but the resident of Minnesota who owns lands in another state should not be discriminated against and loaded up with the penalty inflicted in this case simply because his lands happen to be in another State.

He is placed in a simply impossible situation where he is denied the protection of the law of Minnesota, because it is impossible for

him to bring himself within its terms. Because he has failed to accomplish the impossible he is then denied the benefit of the law of the situs of the property. In this way he is denied the protection of any law, while the resident owner selling Minnesota land is given a possible and presumably adequate remedy. There is no basis in reason or justice for this distinction. That the legislature never intended to make any distinction is we think, perfectly apparent. but the Court below has decided that it did.

IX.

THE ACTION OF THE SUPREME COURT OF MINNESOTA IN APPLYING TO CONTRACTS UPON LANDS WITHOUT THE STATE OF MINNESOTA THE PROHIBITION OF THESE STATUTES, IN AND OF ITSELF CONSTITUES A TAKING OF THE PROPERTY OF THE PLAINTIFF IN ERROR WITHOUT DUE PROCESS OF LAW AND DENIES TO PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS.

While we believe that it was never intended by the legislature in enacting these statutes to make them cover any such contracts as those in question yet the Court below has decided that such is the case and its construction is presumably binding upon us in this Court.

The action of the Court under the circumstances is the action of the State, and the rendition of a judgment herein which takes the property of the plaintiff in error and gives it to the defendant in error is just as arbitrary an act as would have been a direct act of the legislature transferring $4030 from the plaintiff in error to the defendant in error.

X.

BY THIS DECISION THE COURT BELOW REFUSED TO GIVE FULL FAITH AND CREDIT TO THE ACTS AND RECORDS OF COLORADO.

The decision in this case holds the remedy of this statute to be exclusive of all others. Whether foreclosure were had under the common law or a statute, whether by notice or by an action in equity in the State where the land lay, it is all of no effect; for if such a contract should be foreclosed in equity in the State where the land lay, it would be no compliance with the Minnesota statutes, and the only protection the vendor would have would be to plead such decree, and if the Court refused to give effect to the same, to assert in this Court, as ground for reversal the failure of the Court below so to do as a violation of the full faith and credit clause of the Constitution.

Chicago etc. Railway Co. vs. Wiggins Ferry Co., 119 U. S. 622.
Northern Mutual Bldg. etc. Ass'n vs. Brahan, 193 U. S. 647.
Minnesota vs. Northern Securities Co., 194, U. S. 72.

XI.

SUCH LEGISLATION AND THE HOLDING THEREIN OF THE COURT BELOW MAKE AND ENFORCE A LAW WHICH ABRIDGES THE PRIVILEGES AND IMMUNITIES OF PLAINTIFF IN ERROR AS A CITIZEN OF THE UNITED STATES.

Ex parte Virginia, 100 U. S. 347.
Chicago etc. Railway Co. vs. Chicago, 166 U. .S. 234.
Missouri vs. Dockery 191, U. S. 170.
Huntington vs. New York, 118, Fed. Re. 686.

CONCLUSION.

It is most respectfully submitted, therefore, that the legislation in question is beyond the right and power of the State of Minnesota to enact or of its court to enforce; that it attempts to deprive plaintiff in error of its right of contract, of the benefit of the law of the state where his land is situate, lessens the value of his said property by placing unreasonable burdens and restraints upon it, denies to him the protection of any law whatever either of the one state or the other, while leaving the vendee to take advantage of either or both of said laws as he may see fit; and generally creates an intolerable situation, destructive of the rights of plaintiff in error and all other vendors similarly situated.

For these reasons it is most respectfully submitted that the judgment of the court below should be reversed.

Arthur W. Selover

Attorney for Plaintiff in Error.

Minneapolis, Minnesota.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 32.

SELOVER, BATES AND COMPANY,
Plaintiff in Error,

vs.

ELLA T. WALSH,
Defendant in Error.

Brief for Defendant in Error.

A. B. CHOATE,
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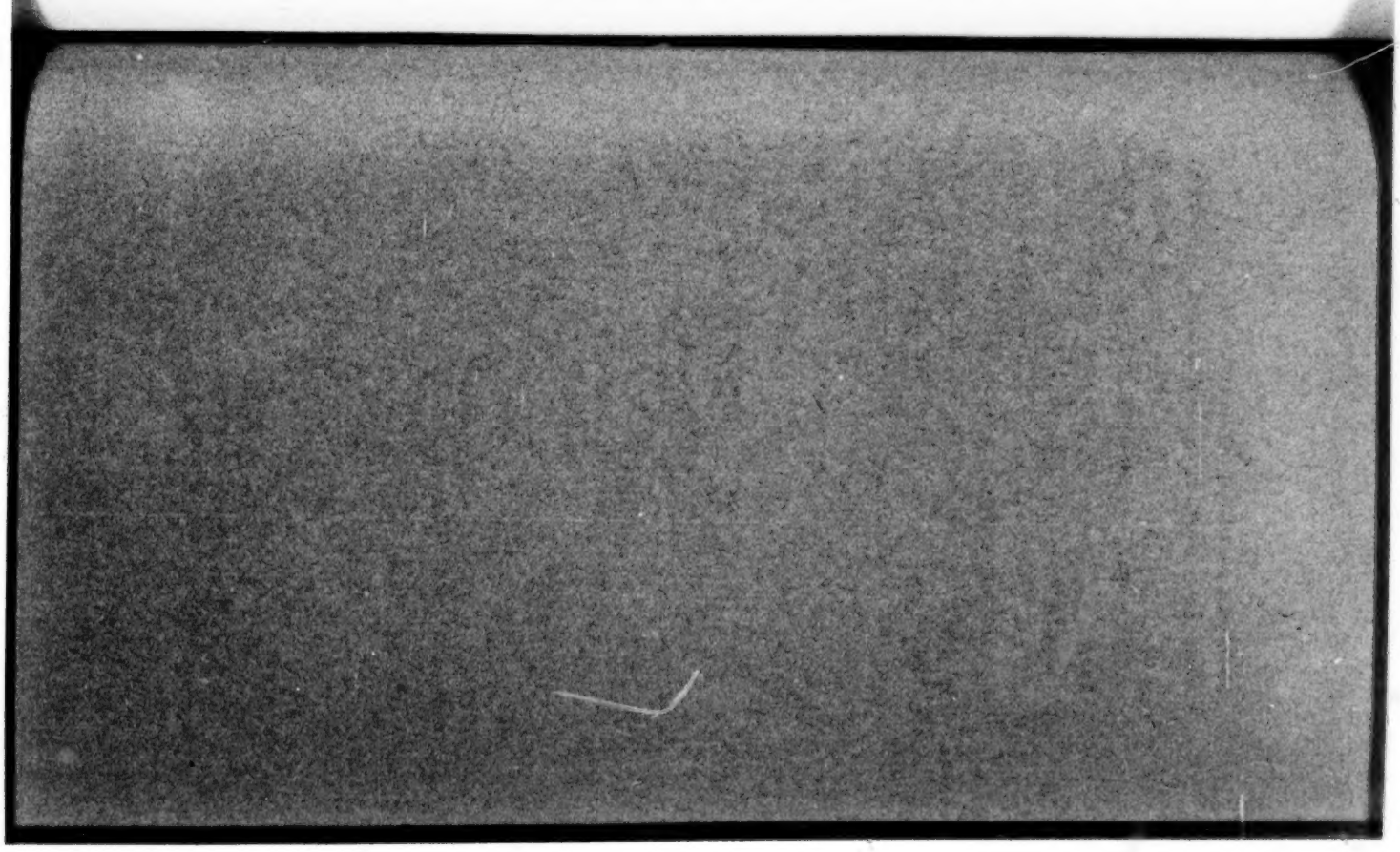
Review Publishing Company, Minneapolis, Minnesota.



Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 238.

SELOVER, BATES AND COMPANY,
Plaintiff in Error,

vs.

ELLA T. WALSH,
Defendant in Error.

STATEMENT OF CASE.

THE SHORT FACTS.

Plaintiff in error, a corporation organized under Minnesota laws, seeks to secure for itself over five thousand dollars increase in value of land by summarily and without notice annulling a contract for the sale of land, which contract was made in Minnesota, to be performed in Minnesota. This attempt was made in direct violation of a Minnesota statute (Ch. 223, laws 1897), which was in force when the contract was made and which required thirty days' notice of cancellation of such contracts. The reason given by plaintiff for annulment was failure for five days to pay $13.96 taxes.

Upon such repudiation of the contract by plaintiff in error, this action *in personam* was com-

menced by defendant in error to recover $5,308.21 damages from plaintiff in error for terminating and repudiating the contract without notice.

The supreme Court of Minnesota decided that the thirty days' notice required by Chapter 223 should have been given and that, having refused to be bound by the contract without giving such notice, plaintiff in error should pay the resulting damages. This decision is brought here by writ of error.

THE FACTS MORE IN DETAIL.

(a) *Parties.*

The contract was made between Silas H. Bates, the vendor and assignor of Selover, Bates & Co., plaintiff in error, and P. D. Walsh, the vendee and assignor of Ella T. Walsh, defendant in error. Silas H. Bates was one of a partnership doing a real estate business in Minneapolis, Minnesota, under the style and firm name of Selover, Bates & Co. The laintiff in error is a corporation which succeeded to this partenrship of the same name and was organized in 1905 under the laws of Minnesota, where it has, at all times since maintained an office and done a real estate business (p. 24 Original Record). The president of plaintiff in error, who appears to have conducted the transactions in question, was a lawyer named George H. Selover (pp. 26, 60, and Exhibit B, p. 11, Exhibit K, p. 38, Exhibit H, p. 56, Exhibit I, p. 58, Original Record). P. D. Walsh is a Dakota farmer (p. 47 Original Record) and Ella T. Walsh is his wife.

(b) *Where the Contract was Made.*

All the terms of the contract were agreed upon and reduced to writing in duplicate in the office of Selover, Bates & Co. in Minneapolis, Minnesota. These duplicate contracts were then held at Minneapolis, Minnesota, at the office of Selover, Bates & Co. for payment of $50 by Walsh before delivery. Later the $50 was paid at the same office and thereupon the contracts were signed in duplicate at Minneapolis by Bates and mailed to P. D. Walsh in Dakota, where they were signed by Walsh and one copy (Exhibit A) was mailed to Minneapolis (Settled Case, p. 28, Print and Opinion, p. 98 Print).

(c) *Place of Performance of Contract.*

By the terms of the agreement all payments were to be made at office of Selover, Bates & Co., Minneapolis, Minn., except that the taxes were to be paid in Colorado. The place of delivery of the deed is not expressly stated, but, since it was to be delivered upon the payment of the consideration at Minneapolis, it is fair to presume the deed was to be delivered at the same place (Exhibit A, p. 11 Print).

(d) *Default Clause in Contract.*

The fourth paragraph of the contract (Exhibit A) provides for its arbitrary abrogation by the vendor without any declaration of forfeiture upon failure of the purchaser in any respect to keep and perform each and every covenant.

(e) *Minnesota Statute.*

At the time this contract was made and when plaintiff in error abrogated it there was a statute of Minnesota in force which prohibited such pre-emptory termination of contracts as plaintiff in error was guilty of in this case. (This statute is printed on pp. 113-115 Print Record).

(f) *Increase in Value of Land.*

Arbitrary Cancellation of Contract.

The land in question, valued in the contract at $1,234.00, had, according to the admission of plaintiff in error, increased in value in 1907, when annuled by plaintiff in error, to $4,320.00 (Amended Ans. Fol. 41, p. 18 Print Record). According to the claim of defendant in error, it had increased to $5,760.00. In the meantime Walsh had paid nearly $800.00 on the contract.

On March 1, 1907 $13.96 taxes became due. These were paid by plaintiff in error and four days later, on March 5, 1907, claiming default had been made by failure to pay these taxes, plaintiff in error, without any attempt or pretense of complying with the statute complained of, served notice on P. D. Walsh (Exhibit B), declaring the contract null and void and refused to be further bound by it.

By this arbitrary notice plaintiff in error sought to secure this large increase in the value of the land and about $200.00 cash paid on the contract because of failure for five days to pay $13.96 taxes.

BRIEF AND ARGUMENT.

What the Supreme Court of Minnesota Decided.

The Supreme Court of Minnesota decided that Chapter 223 of the laws of 1897 applies in so far as concerns an action for damages for the breach of an executory contract made and to be performed in the state of Minnesota for the sale of land in another state, notwithstanding the vendee resides in another state; that as so applied the state law, does not contravene Section 1, Art. 14 of the Constitution of the United States. That is all the state court decided so far as concerns this court.

(See syllabus and Original Opinion, pages 98 and 99, and Per Curiam decision at bottom of page 108 of Record, Print.)

Record Assignments of Error.

No other section of the Constitution of the United States is referred to in the assignments of errors, attached to the application for writ of error than that mentioned in the decision of the Supreme Court of Minnesota. (pp. 116-117 of Record, Print).

Informal announcement by plaintiff in error of intention to discuss other questions accounts for a portion of this brief not directed to the assignments of error mentioned.

A FICTITIOUS CASE.

It will be observed that the judgment sought to be reviewed does not purport to determine what steps are necessary to serve the 30 days' notice in order to comply with the act in question, but merely that the act applies to the contract in so far as concerns an action for damages.

In so far, then, as the brief of plaintiff in error has to do with the actual steps required to be taken by Chapter 223 in giving notice to terminate a contract, it deals with a fictitious case. The plaintiff in error not having attempted to comply with the Minnesota law, the state court did not construe the act in that respect and the judgment in this case does not cover questions of that character presented to this court by plaintiff in error.

If the plaintiff in error had made a *bona fide* attempt to comply with the statute and the Supreme Court of Minnesota had, in a case questioning the sufficiency of the acts of compliance, construed the statute as requiring something impossible, a judgment of the state court would have been rendered upon the point argued by plaintiff in error which this court could review. It is a fruitless task to guess what the Supreme Court of Minnnesota may determine when an actual case is presented to it requiring it to determine what steps are necessary to comply with the statute in giving the thirty days' notice. Until such time there is no judgment in a case of the kind discussed by plaintiff in error for this court to review.

A Minnesota contract.

For the reasons mentioned in the decision of the state court, and for other reasns, apparent from the record, it seems beyond question that the contract was not only made in Minnesota but was to be performed there.

Even if it could be technically held that the contract was made in Dakota, which is not conceded, "The general principal in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance."

Andrews v. Pond, 13 Peters 65 (78).

Subordination to local law.

Assuming that the default clauses of this contract were valid by the law of some other state, the Minnesota courts would not enforce them if they contravened the laws of Minnesota.

Oscanyan v Arms Co., 103 U. S. 261 (277).

Teal v. Walker, 111 U. S. 242 (252).

Void everywhere.

If this obnoxious condition for forfeiture was void under Minnesota statutes, then being a Minnesota contract, it was void everywhere, and it is immaterial what the law of any other state is, whether for the foreclosure of such contracts or for other remedy.

Andrews v. Pond, Id.

THE PROPER CONSTRUCTION OF CHAPTER 223, LAWS 1907—PLAINTIFF'S FEARS.

Counsel for plaintiff in error argue vigorously and earnestly to show the great financial injustice to real estate dealers of a holding that the act in question applies to such a contract as the one at bar, claiming that:

> "Such a holding would necessarily drive every * * * dealer in land in other states out of the state of Minnesota. * * * That since plaintiff in error 'cannot get away from the effect of this statute * * * because it is a corporation of this state * * * the only thing it can do is to * * * submit to * * * civil death' " (pp. 106-107 of Record, Print).

It might be unfortunate for the state of Minnesota as well as for plaintiff in error if these fears were well founded. But they are not. These fears and arguments are based upon the gratuitous assumption that, if the Supreme Court of Minnesota should ever be called upon in a proper case to determine just what steps must be taken under Chapter 223, to give the thirty days' notice required thereby, that the court would so construe the law as to require the impossible.

(b) *Presumption of Validity Prevails.*

> "Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt."
>
> *Sinking Fund Cases*, 99 U. S. 700 (718).

Reasonable Construction by State Court Presumed.

Until the Supreme Court of Minnesota shall construe the statute in question as requiring the plaintiff in error to do some impossible thing, application to this court is premature. This court will not so construe it if it is capable of a construction to the contrary.

Lieberman v. Van De Carr, 199 U. S. 552 (562).
Carroll v. Greenwich Ins. Co., 1999 U. C. 401 (412).

> "The Statute Is Whatever The Minnesota Supreme Court Says It Is and Nothing Else."

The foregoing quotation is from the argument of plaintiff's counsel in the application for a rehearing in the state court and is doubtless true. This court will accept as final any construction of a state law made by the court of that state. It is settled, then, that the statute applies. The question raised by plaintiff in error is whether Ch. 223 provides a process which is according to the law of the land whereby plaintiff in error could, in case of default by Mrs. Walsh, have relieved itself from liability for damages for refusing to be further bound by the contract.

Suppose, then, that the plaintiff in error had tried to comply with the act in question and had published the notice of cancellation in the county in Colorado where the land lies, or had published it at the capital of the state of Minnesota, or in both places, would it be irrational for the Supreme Court of Minnesota to say that such publication was a

sufficient compliance with the act to defeat an action for damages in a Minnesota court in a case of this kind? So construed, would not the act be valid?

No Sheriff's Return Necessary.

While this is not an action to foreclose a contract of sale of land in Colorado and while the judgment complained of in no way affects the title to Colorado land, and although the state court has never been required to determine what steps are necessary to comply with Chapter 223 in order to give the thirty days' notice thereby required; nevertheless plaintiff in error assumes the opposite view. Plaintiff in error contends, that in as much as the court decided that to avoid liability for damages for refusing to be governed by the contract, it should have given the thirty days' notice required by Chapter 223, the court did thereby, and in this action, in effect claim the right for the state of Minnesota to regulate the foreclosure of contracts for the sale of land in Colorado. This question is discussed elsewhere in this brief.

Plaintiff in error also contends that the court did further in this case decide that the act in question required the plaintiff in error to do what is impossible, viz: Secure the return of a Minnesota sheriff in the county in Minnesota where the land lies that the vendee could not be found in Minnesota before publication of the notice. This contention we believe to be unfounded. This claim is based upon a provision of the statute that such return should

be *prima facie* evidence of non-residence. The character and effect of this action and the alleged hardships imposed by the decision of the Supreme Court of Minnesota are discussed elsewhere in this brief. The only question we care to discuss under this heading is the necessity for a sheriff's return as a prerequisite to publication of notice of default, although we do not consider the question to be properly before this court.

Prima Facie Evidence not Exclusive.

Plaintiff in error overlooks the elementary rule of evidence that, when a statute makes a certain fact *prima facie* evidence of another fact, the *prima facie* evidence is neither necessary nor exclusive of other evidence. Instead of a hardship being put upon a vendor by this statute, it merely provides a convenient method in some cases to prove a negative.

A Minnesota statute makes a record by a public officer *prima facie* evidence of the facts therein stated, but the court held that such record was not conclusive on any one and that it was open to other proof by the officers themselves.

State v. District Court Ramsey County, 29 Minn. 62 (67).

So, in construing a Minnesota statute providing for publication of summons which made the return of the sheriff *prima facie* evidence of non-residence, the court said that the return being *prima facie* evidence only "that the only office of the sheriff's re-

turn is not to *authorize* publication, but to support and sustain it after it had been made."

Easton v. Childs, 67 Minn. 212.

That neither the *making* nor *filing* of the return were jurisdictional.

Perkins v. Gibbs, 108 Minn. 151.

If it be true, as claimed by plaintiff in error, that it is impossible to secure a return of a sheriff in a case of this kind which will show that the vendee is a non-resident, then in view of the foregoing decisions of the Minnesota Supreme Court, and of the fact that the attention of the state court was called of this impossibility, it would seem almost conclusive that the state court did not deem a return of a Minnesota sheriff necessary before publication. It would seem almost conclusive that the state court would consider other evidence of non-residence competent in such an action as the one at bar. It will be observed that the statute does not make the filing of a sheriff's return or other preliminary proof of non-residence a prerequisite of publication . It is the *fact* of non-residence not the proof of non-residence which makes publication permissible. It is also significant that while the statute provides for filing with the register of deeds a copy of the notice and proof of service and an affidavit of the vendor that the vendee has not complied with the terms of the notice, it says nothing about filing any return of the sheriff or other proof of non-residence.

Until other proof of non-residence is refused by the state court this court should not be asked to hold that the statute requires a sheriff's return.

See *Hinde v. Vattier*, 5 Pet. 398.

Clement v. Packer, 125 U. S. 309 (322).

The rules of property and of evidence, established by the state tribunals, furnish the guides and rules of decisions in those of the Union in all cases where they apply.

Hinde v. Vattier, 5 Peters 396 (400.)

POLICE POWER.

The sole purpose of the act in question is to prohibit just such unconscienceable conduct on the part of vendors of land as plaintiff in error was guilty of in this case. It is directed solely against vendors. Its purpose is practically the same as an act permitting redemption from the foreclosure of a mortgage.

Argument would seem unnecessary to show that; in a state situated as Minnesota is, comporatively undeveloped, containing many acres of virgin soil and sometimes aptly called the Gateway of the Northwest, where the real estate business consists largely in making contracts with immigrants and emigrants, seeking homes in a new country, that legislation prohibiting the arbitrary cancellation of such contracts is a proper and salutary exercise of the police power. Neither does it seem necessary to cite cases to this court upon that question.

Police Power Exclusive Jurisdiction.

Assuming, then, that the supervision of the cancellation of such contracts is a proper exercise by the state of its police power the wisdom or justice of the state laws passed for that purpose will not be questioned by this court. The 14th Amendment was not designed to interfere with the police power of the state (*Barbier v. Connolly*, 113 U. S. 27 (31). The state government is supreme and exclusive in its own domain. There is no divided sovereignty in the exercise of the police power. Jurisdiction is entirely vested either in the state or the nation and not divided between them.

Matter of Heff, 197 U. S. 488 (505).

New York v. Miln, 11 Peters 102 (138).

In the exercise of the police power a wide discretion is necessary.

License Case, 5 How. 504 (592).

This court will, therefore, not interfere with the exercise of the police power by the state of Minnesota unless some right guaranteed by the United States is clearly invaded.

Injustice Immaterial.

We think that no constitutional right has been invaded in the case at bar and the fears of plaintiff in error of some future injury due to what it deems ill advised or unjust legislation in the exercise of the police power of the state are immaterial for,

> "this court is not the harbor, in which the people of a city or county can find a refuge from ill advised, unequal and oppressive state legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution * * * of the United States is invaded."
>
> *County of Mobile v. Kimball*, 102 U. S. 691 (704).

Suppose it were true that in the exercise of its police power the legislature of the state of Minnesota should determine that it was for the best interests of the state that no real estate dealer should be given the power to cancel a contract at all in case of a sale of land situated in some other state to a non-resident vendee, and the plaintiff in error not being able to amass wealth without that privilege should be obliged to quit business and submit to civil death, as counsel term it. This court will not override the judgment and discretion of the state of Minnesota because corporations which are creatures of that state cannot afford to do a certain class of business unless permitted to violate the state laws. Plaintiff in error has no vested right to sell land in another state which can limit the state in the exercise of its police power.

Butterfield v. Stranahan, 192 U. S. 470 (493).

The Minnesota statute does not go to the extent claimed, but even if it were as stringent as that, this court will not interfere.

UNEQUAL PROTECTION OF THE LAWS.

No lawyer questions the right of the legislature to classify subjects of legislation and legislate for the classes separately.

> "The concluding clause of the first section of the 14th Amendment of the Constitution of the United States simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished."
>
> *Minneapolis Ry. Co. v. Beckwith*, 129 U. S. 26 (at p. 29).
>
> *Barbier v. Conley*, 113 U. S. 27 (31).

The requirements necessary to sustain class legislation are so well settled that citation of authority seems hardly necessary. A good statement of the requirements in this connection is found in

Barbier v. Connolly, 113 U. S. Id.

It seems to defendant in error that a mere reading of the statute in question together with the claim of plaintiff in error that it would drive *every* real estate dealer in lands in other states out of the state of Minnesota is sufficient to dispose of the claim that it invades the right of plaintiff in error to the equal protection of the laws in the light of the authorities above set forth It its argument for a rehearing in the state court the plaintiff in error seems to concede that all real estate dealers in Minnesota are equally subject to the law. The fact that plaintiff in error is more seriously inconvenienced than other dealers who are not corporations organized under the laws of Minnesota be-

cause plaintiff can not move into another state to operate and thus get away from the jurisdiction of the state is of no importance. Police regulations may press with more or less weight upon one than on another (*Barbier v. Connolly*, 113 U. S. 27 (31). All residents of the state seeking to sell lands to non-residents, situated in another state, would be treated alike and would suffer alike.

THE JUDMENT COMPLAINED OF IS NOT AN ATTEMPT TO EXERCISE EXTRA TERRITORIAL JURISDICTION.

The claim has been made that the judgment complained of in this personal action is in effect an attempt by the state to regulate the foreclosure of a contract upon land in another state and is, therefore, not due process of law.

Suppose a loan be made in Minnesota by a corporation organized under the laws thereof to a non-resident and a note therefor be made in Minnesota and payable therein, providing for usurious interest which, according to Minnesota law, invalidated the whole transaction and prohibited the lender from enforcing security for the loan or collecting any of the money loaned. If, upon threats of collection by the vendor, the borrower should commence an action in Minnesota against the corporation, still owning the note, to cancel the note and enjoin the corporation from collecting the money actually loaned or foreclosing the mortgage given to secure the same, would any one think of contending that the courts of Minnesota had no jurisdiction over the corporation and the subject of the action be-

cause it appeared that the mortgage was on lands situated in another state? Would any one think of contending that such an act of the state of Minnesota was an attempt to regulate the foreclosure of mortgages in another state?

De Wolf v. Johnson, 10 Wheat. 368 (382-3).

The case at bar is an analogous one. The plaintiff in error admits that it cannot get out of the jurisdiction of the Minnesota courts and the court unquestionably had jurisdiction of this Minnesota contract. The state courts are not so impotant in the enforcement of their laws as the adoption of the theory of plaintiff in error would render them.

POINTS NOT COVERED BY ASSIGNMENTS OF ERRORS.

Twice during the month of April, 1912 and after the brief of defendant in error was practically completed, the attorney for defendant in error was informally notified of proposed changes in the assignments of error printed in the record. The first change proposed was the addition of an assignment to the effect that the state law complained of impaired the obligation of the contract in question, contrary to Sec. 10, Article I, of the Constitution of the United States. The second proposed change was to the effect that the state law, if applied to the contract in question, fails to give full faith and credit to the ACTS of the state of Colorado contrary to Article IV, Section 1, of the Constitution of the United States. Neither of these assignments of error were made at the time of the application for writ of error herein and are not attached there-

to. The only assignments in the record refer to Section 1, Article 14 of the Amendments of the Constitution of the United States (see pp. 116-117 Record, Original).

These additional assignments of error, aside from their late conception and posthumous character, have no merit.

IMPAIRMENT OF THE OBLIGATION OF CONTRACT.

The contract clause of the Constitution of the United States has reference only to a statute of a state enacted after the making of the contract whose obligation is alleged to have been impaired; it does not apply to laws enacted prior to the contract, the obligation of which is asserted to be impaired.

Ogden v. Saunders, 12 Wheat. 213 (303).

In *Edwards v. Kearzey*, 96 U. S. 595 (603), the court say:

> "The inhibition is wholly prospective. The states may legislate as to the contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect."

FULL FAITH AND CREDIT TO COLORADO ACTS.

As to full faith and credit not being given to the ACTS of Colorado, the record in this case fails to show that the Supreme Court of Minnesota ever had the existence of any act of Colorado brought to its attention in any manner.

Chicago & Alton R. D. Co. v. Wiggins Ferry Co., 119 U. S. 615 (622).

Such assignment of error is cumulative evidence that plaintiff in error prefers fiction to fact. Having had no opportunity at this date to examine the brief of plaintiff in error, it does not seem necessary or feasible to give further consideration to these two assignments of error.

It is respectfully submitted that the judgment of the state court should be affirmed.

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SELOVER, BATES AND COMPANY *v.* WALSH.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 22. Submitted October 29, 1912.—Decided December 2, 1912.

With the ruling of the state court as to the applicability of a state statute to a particular contract this court has nothing to do. It is concerned only with the question of whether as so applied the law violates the Federal Constitution.

The court may, through action upon, or constraint of, the person within its jurisdiction, affect property in other States.

The obligation of a contract is the law under which it was made, even though it may affect lands in another State; and in an action which

does not affect the land itself but which is strictly personal, the law of the State where the contract is made gives the right and measure of recovery.

A contract made in one State for the sale of land in another can be enforced in the former according to the *lex loci contractu* and not according to the *lex rei sitæ*. *Polson* v. *Stewart*, 167 Massachusetts, 211, approved.

Where the state court has construed a state law as applied to the case at bar, this court will presume that the state court will make the statute effective as so construed in other cases. This court will not anticipate the ruling of the state court.

A state statute providing that the vendor of lands cannot cancel the contract without reasonable written notice with opportunity to the vendee to comply with the terms is within the police power of the State; and so *held* that Chapter 223 of the Laws of 1897 of Minnesota is not unconstitutional under the Fourteenth Amendment as depriving a vendor of his property without due process of law or denying him the equal protection of the law.

The test of equal protection of the law is whether all parties are treated alike in the same situation.

Contentions as to unconstitutionality of a state statute not made in the court below cannot be made in this court.

A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the laws of a State. *Western Turf Association* v. *Greenburg*, 204 U. S. 359.

109 Minnesota, 136, affirmed.

THE facts, which involve the construction of a contract made in Minnesota for sale of land situated in Colorado, and the application thereto of a statute of Minnesota, are stated in the opinion.

Mr. Arthur W. Selover for plaintiff in error:

The *lex loci rei sitæ* applies to all matters with reference to the transfer of lands, including contracts for the purchase and sale thereof.

The law of the State in which mortgaged property is situated governs the redemption. *Brine* v. *Insurance Co.*,

96 U. S. 627; Dicey, Conflict of Laws, 573; Story, Conflict of Laws, p. 591; *Tillotson* v. *Prichard*, 60 Vermont, 94, 107; *In re Kellogg*, 113 Fed. Rep. 120; *Bendey* v. *Townsend*, 109 U. S. 665; *Orvis* v. *Powell*, 98 U. S. 176; *Smith* v. *Smith*, 102 U. S. 442; *Mason* v. *N. W. Mutual Life Ins. Co.*, 106 U. S. 163; *Parker* v. *Dacres*, 130 U. S. 43.

Capacity to contract regarding the sale of lands depends on the laws of the State wherein the lands are situate. Rorer on Inter-State Law, 190, 209, and see p. 167.

The courts of one State cannot order the sale of lands in another. *Watkins* v. *Holman*, 16 Pet. 26, 57; *United States* v. *Fox*, 94 U. S. 315, 320.

That state laws have no extra-territorial effect is undoubted. *Brine* v. *Hartford Fire Ins. Co., supra; Lyons* v. *McIlvaine*, 24 Iowa, 9.

A statute of redemption affects the right and not the remedy. *Bronson* v. *Kinzie*, 1 How. 311, 314; *Green* v. *Biddle*, 8 Wheat. 75, 84.

The common-law right of termination entered into this contract in its inception and the right of the vendor to foreclose in this matter is just as binding as would have been the right of redemption of the vendee had one been given him by statute in Colorado at that time.

Under the common law parties have the right to contract as they will respecting time being of the essence of such a contract and as to the conditions and circumstances under which said contract shall terminate; and the courts will respect and carry out such stipulations to the letter. *MacKey* v. *Ames*, 31 Minnesota, 103; *Schuman* v. *Mack*, 35 Minnesota, 279; *Dana* v. *St. P. Inv. Co.*, 42 Minnesota, 194; *Pagel* v. *Park*, 50 Minnesota, 186; *Joselyn* v. *Schwend*, 85 Minnesota, 130; *Tinque* v. *Patch*, 93 Minnesota, 437; *Schwab* v. *Baremore*, 95 Minnesota, 295; *Crisman* v. *Miller*, 21 Illinois, 227-235; *Heckord* v. *Sayne*, 34 Illinois, 142; *Apking* v. *Hoffer*, 104 N. W. Rep. (Neb.) 1; *Iowa R. L. Co.* v. *Mickel*, 41 Iowa, 402; *St. Louis Trust Co.* v.

York, 81 Mo. App. 342; *Coughran* v. *Bigelow*, 9 Utah, 200; *Woodruff* v. *Semi Tropic Land & Water Co.*, 87 California, 275; *Oxford* v. *Thomas*, 160 Pa. St. 8; *Gilbert* v. *Union Pacific R. R. Co.*, 112 N. W. Rep. (Neb.); *Murphy* v. *McIntyre*, 116 N. W. Rep. (Mich.) 197.

Any attempt on the part of the State of Minnesota to authorize the foreclosure of such a contract would be, if effective to any degree as against the non-resident vendee, a taking of his property without due process of law and would deny him the equal protection of the laws. *Pennoyer* v. *Neff*, 94 U. S. 714.

It is physically impossible for the vendor in this contract to comply with any of the requirements of the said statute or to obtain any benefit from its provisions. *Edwards* v. *Kearzey*, 96 U. S. 595; *Fletcher* v. *Peck*, 6 Cranch, 87; *Green* v. *Biddle*, 8 Wheat. 1; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Curran* v. *Arkansas*, 15 How. 304; *Freeman* v. *Howe*, 24 How. 450; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Hawthorne* v. *Calef*, 2 How. 10; *White* v. *Hart*, 13 Wall. 646; *Gunn* v. *Barry*, 15 Wall. 610; *Walker* v. *Whitehead*, 16 Wall. 314.

The state court describes this statute as one authorizing the summary termination of the contract, and a divestiture of the equitable rights of the vendee must be directly complied with. *Hage* v. *Benner*, 111 Minnesota, 305.

Such statute is beyond the power of the State to enact or enforce. *Bronson* v. *Kinzie*, 1 How. 311; *Watts* v. *Waddell*, 6 Pet. 389; *Kendall* v. *United States*, 12 Pet. 524; *Boswell* v. *Otis*, 9 How. 336; *Howes* v. *Hardeman*, 14 How. 334; *Tennessee* v. *Sneed*, 96 U. S. 69; *Allis* v. *Insurance Co.*, 97 U. S. 145; *Orvis* v. *Powell*, 98 U. S. 176; *Schley* v. *Pullman Palace Car Co.*, 120 U. S. 575; *Langdon* v. *Sherwood*, 124 U. S. 74; *Bacon* v. *Northwestern Mutual Ins. Co.*, 131 U. S. 258; *McGahey* v. *Virginia*, 135 U. S. 662–694;

Goldey v. *Morning News*, 156 U. S. 521; *Barwitz* v. *Beverly*, 163 U. S. 127; *DeVaughn* v. *Hutchinson*, 165 U. S. 570; *Duer* v. *Blockman*, 169 U. S. 243, 247; *Caledonia Coal Co.* v. *Baker*, 196 U. S. 444; *Ex parte Young*, 209 U. S. 123; *Fall* v. *Eastin*, 215 U. S. 1–8; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 367; *Benedict* v. *St. Joseph W. Ry. Co.*, 19 Fed. Rep. 176; *Singer Mfg. Co.* v. *McCullock*, 24 Fed. Rep. 669; *Union Mutual Ins. Co.* v. *Union Mills Co.*, 37 Fed. Rep. 292; *Central Trust Co.* v. *Union Ry. Co.*, 65 Fed. Rep. 257; *Southern Ry. Co.* v. *Bouknight*, 70 Fed. Rep. 442, 446; *Deck* v. *Whitman*, 96 Fed. Rep. 873, 884; *Nelson* v. *Potter*, 50 N. J. Law, 324, 326; *Lindley* v. *O'Reilly*, 50 N. J. Law, 636, 643; *Second Ward Bank* v. *Schrank*, 97 Wisconsin, 250, 262; *Griffin* v. *Griffin*, 18 N. J. Eq. 104, 107; *Jackson* v. *Dunlap*, 1 Johns. 114; *Jackson* v. *Parkhurst*, 4 Wend. 369; *Rockwell* v. *Hobby*, 2 Sanford C. R. 9.

Considered from an international point of view, jurisdiction to be rightfully exercised must be founded upon the person being within the territory—for otherwise there can be no sovereignty exercised. Story on Conflict of Laws, 754; Wharton on Conflict of Laws, 64; *Boswell's Lessee* v. *Otis*, 9 How. 336, 348; *United States* v. *Fox*, 94 U. S. 315; *Freeman* v. *Alderson*, 119 U. S. 185; *Arndt* v. *Griggs*, 134 U. S. 316, 320; *Dewey* v. *Des Moines*, 173 U. S. 193, 204; *Overby* v. *Gordon*, 177 U. S. 214, 222; *Old Wayne Ins. Co.* v. *McDonough*, 204 U. S. 8, 21.

The doctrine of *Pennoyer* v. *Neff* is followed and the previous decisions of the Massachusetts court to the contrary overruled. *Elliot* v. *McCormick*, 144 Massachusetts, 10, and see *Cooper* v. *Reynolds*, 10 Wall. 308; *Eastman* v. *Wadleigh*, 67 N. H. 251; *Esterly* v. *Goodwin*, 35 Connecticut, 273, 277.

Strictly speaking the contract was not made in Minnesota, and the holding of the court below that it was is against the great weight of authority. The contract became effective upon its acceptance and signature by the

vendee in North Dakota. *Killeen* v. *Kennedy*, 90 Minnesota, 414; *Stockham* v. *Stockham*, 32 Maryland, 196; *Milliker* v. *Pratt*, 125 Massachusetts, 374; *Bauer* v. *Shaw*, 168 Massachusetts, 198; *Abbott* v. *Shepard*, 48 N. H. 14; *Hass* v. *Myers*, 111 Illinois, 421; *Crandall* v. *Willig*, 166 Illinois, 233; *Patrick* v. *Bowman*, 149 U. S. 411, 424; *Machine Co.* v. *Richardson*, 89 Iowa, 525; *Cooper* v. *Company*, 94 Michigan, 272; *Tolman Co.* v. *Reed*, 115 Michigan, 71; 2 Kent's Comm. 47; 1 Parsons, Contracts, 475; 1 Story, Contracts, 490; Hilliard on Sales, § 20; Benjamin on Sales, § 73; *Bascom* v. *Ediker*, 48 Nebraska, 380; *Gay* v. *Rainey*, 89 Illinois, 221; *Eliason* v. *Henshaw*, 4 Wheat. 225; *McIntyre* v. *Parks*, 3 Metc. (Mass.) 207; *Buchanan* v. *Bank*, 55 Fed. Rep. 223; *Western &c. Co.* v. *Kilderhouse*, 87 N. Y. 430.

The place of the acceptance of a proposition is the place of the contract. Where a written contract, signed by one party is forwarded to be signed by another the place of signature or assent is the place of the contract. Wharton on Conflict of Laws, 886; *Emerson Co.* v. *Proctor*, 97 Maine, 360; *Northampton Insurance Co.* v. *Tuttle*, 40 N. J. Law, 176; *Hill* v. *Chase*, 143 Massachusetts, 129; *Morehouse* v. *Terrill*, 111 Ill. App. 460; *Born* v. *Insurance Co.*, 120 Iowa, 290; *Lawson* v. *Tripp*, 90 Pac. Rep. 500; *Gallaway* v. *Standard Ins. Co.*, 45 W. Va. 237; *Rickard* v. *Taylor*, 122 Fed. Rep. 931; *Newlin* v. *Prevo*, 90 Ill. App. 515; *Central of Georgia Railway* v. *Gortalowiski*, 123 Georgia, 366; *Waldron* v. *Ritchings*, 9 Abb. Pr. (N. S.) 359; *Aultman, Millers Co.* v. *Holder*, 68 Fed. Rep. 467; *Perry* v. *Iron Co.*, 15 R. I. 380; *Cobb* v. *Dunleavi*, 6 S. E. Rep. 384; *Bank* v. *Doedny*, 113 N. W. Rep. 81.

Contract made by telephone by persons in different counties is made where the person is who accepts the offer of the other. *Bank of Yolo* v. *Sperry Flour Co.*, 90 Pac. Rep. (Cal.) 855.

The act of performance, default in which gave the admitted right to terminate the contract, arose not in

Minnesota but in Colorado where alone the taxes were to be paid. There was no breach at the time of any act to be performed by the vendee in Minnesota.

Such statutes are void as depriving plaintiff in error of its liberty of contract without due process of law. *Mathews* v. *People*, 202 Illinois, 389; *Gillespie* v. *People*, 188 Illinois, 176.

With the constitutional right to contract and terminate contracts, the legislature cannot interfere. *Ritchie* v. *People*, 155 Illinois, 98; *Frorer* v. *People*, 141 Illinois, 172; *State* v. *Julow*, 129 Missouri, 163; *Cleveland* v. *Clements Brothers*, 67 Oh. St. 197; *Shaughnessey* v. *American Surety Co.*, 138 California, 543; *State* v. *Robbins*, 71 Oh. St. 273; 290; *Kuhn* v. *Common Council*, 70 Michigan, 534; *Andrews* v. *Beane*, 15 R. I. 451; *Powers* v. *Shephard*, 45 Barb. 524.

The statute here involved denies the right of contracting parties to fix the terms on which their contract shall terminate or to waive notice of termination. This has been held to be an unwarranted interference with the right to contract. *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931.

This court in several important cases has affirmed the same doctrine under the provisions of the Fifth and Fourteenth Amendments. *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

Liberty of contract is subject to reasonable police regulation by the State, but only with respect to a subject-matter over which it has jurisdiction. To prohibit the making of a certain kind of contract respecting the transfer of land in another State, is to deprive the citizen of his liberty of contract.

Such statutes are void as depriving the plaintiff in error of its property without due process of law.

Abolishment of all remedy is objectionable to the Con-

stitution in that it deprives the citizen of his property without due process of law. Black on Const. Prohibitions, §§ 146-171; Sutherland on Stat. Const., 1206; *Butz* v. *Muscatine*, 8 Wall. 575.

Such statutes are void because they deny to the plaintiff in error the equal protection of the laws.

A transfer or a right to transfer immovable property cannot be subject to regulations at the same time by two different and distinct sovereignties. In so far as the State of Minnesota penalizes its resident owner because he has obeyed the law of the State or country wherein the land is situated—the law which he must be subject to—just so far does it exceed its powers and deny to its citizen the equal protection of the laws. *Price* v. *Pennsylvania*, 113 U. S. 218; *Allen* v. *St. Louis Bank*, 120 U. S. 27; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 544; *Massie* v. *Cesna*, 239 Illinois, 352; *Cincinnati S. R. Co.* v. *Snell*, 193 U. S. 30; *Ex parte Hollman*, 60 S. E. Rep. 19, 25; *Ex parte Hawley*, 115 N. W. Rep. 93; *American T. Co.* v. *Superior Court*, 90 Pac. Rep. 15; *In re Van Horne*, 70 Atl. Rep. 986; *Greene* v. *State*, 122 N. W. Rep. 6; *Lovely* v. *M., K. & T. Ry. Co.*, 120 S. W. Rep. 852; *Hoxie* v. *N. Y., N. H. & H. R. Co.*, 73 Atl. Rep. 754; *Employers' Liability Cases*, 207 U. S. 463, 501; *Seaboard Air Line* v. *Railway Com'rs*, 155 Fed. Rep. 792; *Board of Education* v. *Alliance Assurance Co.*, 159 Fed. Rep. 994; *Phipps* v. *Wisconsin Central Ry. Co.*, 133 Wisconsin, 153.

By this decision the court below refused to give full faith and credit to the acts and records of Colorado. *Chicago &c. Railway Co.* v. *Wiggins Ferry Co.*, 119 U. S. 622; *Northern Mutual Bldg. Ass'n* v. *Brahan*, 193 U. S. 647; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 72.

Such legislation and the holding therein of the court below make and enforce a law which abridges the privileges and immunities of plaintiff in error as a citizen of

the United States. *Ex parte Virginia*, 100 U. S. 347; *Chicago &c. Railway Co.* v. *Chicago*, 166 U. S. 234; *Missouri* v. *Dockery*, 191 U. S. 170; *Huntington* v. *New York*, 118 Fed. Rep. 686.

Mr. A. B. Choate and *Mr. George W. Buffington* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to the Supreme Court of Minnesota to review a judgment of that court awarding damages to defendant in error for a breach by plaintiff in error of an executory contract for the sale of land situated in the State of Colorado.

The contract was made by one Bates for plaintiff in error at the office of the latter, in the city of Minneapolis, he being one of its officers, with P. D. Walsh, the husband of defendant in error. Walsh, however, actually signed the contract at his residence in South Dakota. He subsequently assigned his interest to her as Bates did to plaintiff in error.

Plaintiff in error, asserting that Walsh had made default of the terms of the contract, canceled it and subsequently sold the land to other parties. This action was then brought by defendant in error, resulting in a judgment for her which was affirmed by the Supreme Court. 109 Minnesota, 136.

By the contract Bates, the assignor of plaintiff in error, covenanted to convey the land to Walsh, the assignor of defendant in error, reserving certain mining rights therein. Payments were to be made in installments at the office of plaintiff in error in Minneapolis, punctually, and it was stipulated "that time and punctuality" were "material and essential ingredients" of the contract. It was covenanted that in case of failure to make the payments

"punctually and upon the strict terms and times" limited, and upon default thereof or in the strict and literal performance of any other covenant, the contract, at the option of the party of the first part (Bates) should become utterly null and void and the rights of the party of the second part (Walsh) should "at the option of the party of the first part utterly cease and determine" as if "the contract had never been made." There was forfeiture of the sums paid and a reversion of all rights conveyed, including the right to take immediate possession of the land "without process of law," and it was covenanted that no court should "relieve the party of the second part upon failure to comply strictly and literally" with the contract.

The default of Walsh consisted in the failure to pay taxes, and plaintiff in error elected to terminate the contract, and gave notice of such election to him in writing in the State of North Dakota. Against the effect of such default and notice defendant in error opposed Chapter 223, Laws of Minnesota (Laws of 1897, p. 431), which provides that a vendor in a contract for the sale of land shall have no right to cancel, terminate or declare a forfeiture of the contract except upon thirty days' written notice to the vendee and that the latter shall have thirty days after service of such notice in which to perform the conditions or comply with the provisions upon which default shall have occurred.

The trial court and the Supreme Court held the statute applicable and judgment went, as we have said, for defendant in error. This ruling is attacked on the ground that as so applied the statute offends against the Fourteenth Amendment of the Constitution of the United States in that it deprives plaintiff in error of its property without due process of law and of the equal protection of the laws.

With the ruling of the court as to the applicability of the statute to the contract we have nothing to do. We are

only concerned with the contention that, as so applied, it violates the Fourteenth Amendment. Of this the Supreme Court said (p. 138):

"There can be no serious question as to the constitutionality of the statute. It in effect prescribes a period of redemption in contracts of this character, and was within the power and authority of the legislature. Defendants' principal contention on this branch of the case is not so much that the statute is unconstitutional as that it should not be construed to apply to contracts made in Minnesota for the sale of land in another state. There is force in this contention; but within the rule of the *Finnes Case*, which a majority of the court do not feel disposed to reconsider, the action does not involve the title to the land, is purely personal, and the rights of the parties are controlled by the laws of this State. Under the decision in that case, defendants had no right arbitrarily to declare the contract at an end and refuse to perform it, and are liable for such damages as their refusal caused plaintiff. Following the *Finnes Case*, we have no alternative but to affirm the action of the court below."

This excerpt clearly presents the ground of the court's decision, and we may put in contrast to it the contention of plaintiff in error. Its contention is that the contract itself provided for the manner of its termination and made exact punctuality the essence of its obligation, and that the statute of the State, as it exempts from such obligation, deprives plaintiff in error of its property without due process of law. The argument to support the contention is somewhat confused, as it mingles with the right of contract simply a consideration of the State's jurisdiction over the land which was the subject of the contract. As to the contract simply we have no doubt of the State's power over it, and the law of the State, therefore, constituted part of it. It is elementary that the obligation of a contract is the law under which it was made, and we are

not disposed to expend much time to show that the Minnesota statute was a valid exercise of the police power of the State. *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549; *Broadnax* v. *Missouri*, *Id.* 285. Whether it had extra-territorial effect is another question. The contention is that the statute as applied affected the transfer of land situated in another State and outside of, therefore, the jurisdiction of the State of Minnesota. In other words, it is contended that the law of Colorado, the situs of the property, is the law of the contract. The principle is asserted in many ways and with an affluent citation of cases. The principle cannot be contested, but plaintiff in error pushes it too far. Courts in many ways through action upon or constraint of the person affect property in other States (*Fall* v. *Eastin*, 215 U. S. 1), and in the case at bar the action is strictly personal. It in no way affects the land or seeks any remedy against it. The land had been conveyed to another by plaintiff in error and it was secure in the possession of the purchaser. Redress was sought in a Minnesota court for the violation of a Minnesota contract, and, being such, the law of Minnesota gave the right and measure of recovery.

In *Polson* v. *Stewart*, 167 Massachusetts, 211, a contract made in North Carolina between a husband and wife, who were domiciled there, by which he covenanted to surrender, convey and transfer all of his rights to lands owned by her in Massachusetts, was declared to be a North Carolina contract and enforceable in Massachusetts notwithstanding that under the law of the latter State husband and wife were incapable of contracting with each other. To the objection that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts, it was answered (p. 214), "Obviously this is not true. It is true that the laws of other States cannot render valid conveyances to property within our borders which our laws say are void, for the

plain reason that we have exclusive power over the *res* . . . But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract." Precedents against the view were noted and contrasted with those supporting it.

The case at bar is certainly within the principle expressed in *Polson* v. *Stewart.* The Minnesota Supreme Court followed the prior decision in *Finnes* v. *Selover, Bates & Co.,* 102 Minnesota, 334, in which it said (p. 337) that upon repudiation of a contract by the seller of land two courses were open to the purchaser: "He might stand by the contract and seek to recover the land, or he could declare upon a breach of the contract and recover the amount of his damages." If he elected the former, it was further said, the courts of Colorado alone could give him relief; if he sought redress in damages the courts of Minnesota were open to him. And this, it was observed, was in accordance with the principle that the law of the situs governs as to the land, and the law of the contract as to the rights of the parties in the contract.

Plaintiff in error bases a contention upon the difficulty of complying with the provisions of the statute with regard to giving notice. Written notice is, as we have seen, necessary to be given of any default, and the time when the cancellation of the contract shall take effect, which must not be less than thirty days after the service; and it is provided that the notice must be served in the manner provided for service of summons in the District Court if the vendee resides in the county where the real estate covered by the contract is situated. If the vendee is not

within the county where the real estate is situated, then notice must be served by publication in a weekly newspaper within the county, or, if there is none in the county, then in a newspaper published at the capital of the State. And it is provided that the vendee shall have thirty days after service to perform the conditions or comply with the provisions. The contention is that these provisions cannot be complied with either in Minnesota or Colorado and that plaintiff in error is brought to the dilemma of not being able to cancel the contract whatever be the default.

The dilemma was not presented to the Supreme Court of the State for resolution, as plaintiff in error had made no attempt to comply with the statute in any way. As that court held the statute applicable to contracts such as that under review, it will, no doubt, in a proper case, so construe the statute as to make it effective. We are not called upon to anticipate its ruling.

It is manifest from these views that plaintiff in error was not by the enforcement of the Minnesota statute deprived of its property without due process of law.

It is further contended that the Minnesota statute denies plaintiff in error the equal protection of the laws and is therefore void. In specification of the way in which this is done plaintiff in error says: "In so far as the State of Minnesota penalizes its resident owner because he has obeyed the laws of the State or country wherein the land is situated—the law which he must be subject to—just so far does it exceed its powers and deny to its citizens the equal protection of the laws." This manifestly is but another way of presenting the argument, which we have answered, that the law of Colorado controls the contract and not the law of Minnesota. Discrimination is not made out by saying that resident owners of Minnesota land are given a right to foreclose their contracts and that residents of Minnesota owning land in other States are not given the same right, even if this were true. The plaintiff

in error is not treated differently from any other seller of land in his situation. This is the test of the application of the equal protection clause of the Constitution of the United States.

Plaintiff in error further charges that the Supreme Court of the State refused to give full faith and credit to the acts and records of Colorado. The contention was not made in the court below and cannot be made here. The same comment is applicable to the contention that privileges and immunities of plaintiff in error as a citizen of the United States are abridged. We may say of the contentions that they are but a repetition of the view that the law of Colorado and not that of Minnesota governs the contract. And we may say further it is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State. *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359.

Judgment affirmed.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER dissent.